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1871

AMERICAN JURIST

AND

LAW MAGAZINE

FROM APRIL 1838 TO JANUARY 1843.

AMERICAN JURIST

AND

LAW MAGAZINE

FROM APRIL 1838 TO JANUARY 1843:

DURING WHICH PERIOD IT WAS CONDUCTED AND PRINCIPALLY EDITED

By LUTHER S. CUSHING.

IN TEN VOLUMES.

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CONTENTS OF VOLUME XXIII.

APRIL—JULY, 1840.

NO. XLV.

ART.	Page.
I.—LAW OF CONTRACTS. No. 7. Of Unlawful Contracts.	1
II.—RIGHTS OF THE SLAVE-HOLDING STATES AND OF THE OWNERS OF SLAVE PROPERTY UNDER THE CONSTITUTION OF THE UNITED STATES,	23
III.—THE LEGAL RULES GOVERNING THE ENJOYMENT AND USE OF LIGHT.	46
IV.—BIOGRAPHICAL SKETCH OF NATHANIEL BYFIELD.	64
V.—ON THE OBEDIENCE DUE FROM SEAMEN TO THE MASTER OF A VESSEL. Extracted from a work now in preparation on Merchant Seamen, by George T. Curtis, Esq.	70
VI.—INTRODUCTION TO PRIVATE INTERNATIONAL LAW. No. 2.	73
VII.—TRIAL OF THE ASSASSINS OF FUALDES.	95
VIII.—DIGESTS OF AMERICAN REPORTS AND AMERICAN LAW PERIODICALS.	128
IX.—PIRACY OF MARKS OR SIGNS OF MERCHANTS AND TRADERS.	138
X.—ON MISTAKES OF LAW.	146
JURISPRUDENCE.	
I.—DIGEST OF ENGLISH CASES.	167
II.—DIGEST OF AMERICAN CASES.	181

ART.	PAGE.
III.—MISCELLANEOUS CASES.	
Gillespie and others <i>v.</i> Forsyth and others.	221
LEGISLATION.	
Virginia.	236
Michigan.	237
CRITICAL NOTICES.	
1.—Peters's Digest.	243
2.—The Judicial Chronicle.	245
3.—Lubé's Equity Pleading.	246
4.—Metcalf and Perkins's Digest.	246
5.—Jurist Reports.	247
6.—Phillipps and Amos's Law of Evidence.	247
INTELLIGENCE AND MISCELLANY.	
Obituary Notice of the late Andrew Stuart, Esq.	248
Mittermaier's Criminal Procedure.	254
QUARTERLY LIST OF NEW PUBLICATIONS.	
England.	255
United States.	255
In Press.	256

NO. XLVI.

ART.	Page.
I.—LAW OF CONTRACTS. No. 8. Construction of Contracts.	257
II.—ON THE EFFECT OF DRUNKENNESS UPON CRIMINAL RESPONSIBILITY AND THE APPLICATION OF PUNISHMENT.	290
III.—BENTHAM'S THEORY OF LEGISLATION.	332
IV.—RIGHTS OF THE SLAVEHOLDING STATES AND OF THE OWNERS OF SLAVE PROPERTY UNDER THE CONSTITUTION OF THE UNITED STATES. (Concluded.)	338
V.—BIOGRAPHICAL SKETCH OF JOHN WINSLOW.	366
VI.—ON MISTAKES OF LAW. (Concluded.)	371
JURISPRUDENCE.	
I.—DIGEST OF ENGLISH CASES.	413
II.—DIGEST OF AMERICAN CASES.	429
III.—MISCELLANEOUS CASES.	
The Hull of a New Brig.	453
LEGISLATION.	
Illinois.	462
Rhode Island.	462
Massachusetts.	463
Georgia.	464
South Carolina.	465
Alabama.	465
CRITICAL NOTICES.	
1.—Lieber's Political Ethics.	467
2.—Rice's Digest of South Carolina Reports.	474
3.—Rice's Digest of Statutes of South Carolina.	474
4.—Revised Statutes of Arkansas.	475
5.—Combe's Lectures on Moral Philosophy.	476
6.—Carey's Introductory Lecture.	476
7.—Criminal Code (project) for the Grand Duchy of Hesse.	477
8.—Attorney General's Annual Report.	477

ART.	Page.
9.—Rice's Equity Reports.	478
10.—Engelmann's Bibliotheca Juridica.	479
11.—Commercial Code of Holland.	480
12.—Destrais, on the Revendication of Movables.	481
13.—Criminal Code (project) for Berne.	482
14.—Rocco on the Authority of Foreign Laws.	482
INTELLIGENCE AND MISCELLANY.	
Theron Metcalf, Esq.	484
Judicial Eloquence.	484
Anecdotes of Erskine.	485
Professor Thibaut.	488
Case of Circumstantial Evidence.	489
Fitness of Lawyers for Legislation.	491
Anecdote of Judge Chase.	492
A Narrow Escape.	492
QUARTERLY LIST OF NEW PUBLICATIONS.	
England.	493
United States.	494
In Press.	495
INDEX.	496

AMERICAN JURIST.

NO. XLV.

APRIL, 1840.

ART. I.—LAW OF CONTRACTS.

No. 7.—*Of Unlawful Contracts.*

ACCORDING to the division of unlawful contracts, which was adopted in our last number, this is the place to consider

II. CONTRACTS WHICH VIOLATE THE PROVISIONS OF A STATUTE.

Before stating the principles which govern the main subject of this division, it may be well to notice the doctrine respecting contracts void in part only, and the alleged difference, as to this matter, between contracts which violate statutes, and those which violate the common law.

It has heretofore been mentioned that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be unlawful, the promise is void. When, however, the illegality of a contract is in the act to be done, and not in the consideration, the law is different. If, for a legal consideration, a party undertakes to do two or more acts, and part of them are unlawful, the contract is good for so much

as is lawful, and void for the residue. Wherever the unlawful part of a contract can be separated from the rest, it will be rejected, and the remainder established. This cannot be done when one of two or more considerations is unlawful—whether the promise be to do one lawful act, or two or more acts, part of which are unlawful—because the whole consideration is the basis of the whole promise. The parts are inseparable. Otherwise there would be two or more contracts, instead of one. But where, for one or more lawful considerations, a promise is made to perform a legal act and also an act illegal, there is no difficulty in sustaining and enforcing the promise *pro tanto*; for so far the contract has all the properties which the law requires. It is “an agreement, upon sufficient consideration, to do a legal act.” The illegal act, which is also agreed to be done, may be rejected without interference with the other. Therefore, says Hutton, J.,¹ “at the common law, when a good thing and a void thing are put together in one self same grant, the same law shall make such a construction, that the grant shall be good for that which is good, and void for that which is void.” By “void,” in this passage, is meant void for illegality, as the context shows, and as it has been received and understood.² So if any part of the condition of a bond be against law, it is void for that part, and good for the rest; or if a bond be given for the performance of covenants contained in a separate instrument, some of which are lawful and others unlawful.³ So of parol contracts.

But it has been asserted, until it has become a maxim, that if any part of an agreement is contrary to a statute, the whole is void.⁴ This distinction manifestly stands on

¹ Ley, 79.

² See 8 East, 236; 1 Johns. 362.

³ Chamberlaine v. Goldsmith, 2 Brownl. 282; Norton v. Syme, Mo. 856.

⁴ 1 Saund. 66, note; 1 Pow. on Con. 199; Chit. on Con. 228, 229. (1st ed.)

no firm principle; and, upon examination, will not be found, as a general rule, to be supported by authority.

The first case on the point is believed to be *Lee and wife v. Coleshill*,¹ under the statute of 5 Edw. VI. prohibiting the sale of offices, &c. By the third section of that statute, "all *such* bargains, sales, promises, bonds, agreements, covenants and assurances," are declared to be void.² According to the report in *Croke, Coleshill*, a custom-house officer, made one Smith his deputy; and covenanted (*inter alia*) to surrender his old patent of office and procure a new one to Smith and himself, before a certain day; and that if Smith died before him, he would pay to Smith's executors £300—and gave Smith a bond to perform these covenants. Upon a suit on this bond, by the executors of Smith, it was held that the whole was void, though some of the covenants might be lawful; "otherwise," said the counsel, "all the meaning of the statute should be defrauded by putting in a lawful covenant within the indenture." Yet the counsel further said—"for the good covenants, peradventure an action of covenant would lie, if they be not performed;" that is, an action on the covenants, but not on the bond given to secure performance of them. The case is reported somewhat differently in 2 *Anderson*, 65, by the name of *Smyth v. Colshill*, but the same ground of decision is taken.

Afterwards, the distinction, on this point, between the common law and a statute, was asserted, *arguendo*, in many cases, as a general principle.³ *Twisden, J.* and *lord C. J. Wilmut* are reported to have ascribed to *lord Hobart* the *dictum* so often repeated in the books, that "a statute is like a tyrant; where he comes, he makes all void. But

¹ Cro. Eliz. 529.

² See *Bac. Ab. Offices, &c. B.*

³ See *Pearson v. Humes, Carter*, 230; *Mosdell v. Middleton*, 1 Vent. 237; 11 Mod. 94, per *Powell, J.*; 2 Wils. 351, per *Wilmut, J.*; 3 Taunt. 244, per *Lawrence, J.*; 1 Johns. 362.

the common law is like a nursing father ; it makes only void that part where the fault is, and preserves the rest."

The cases, in which this distinction is laid down as a general principle, were mostly on bonds taken by officers, contrary to the statute of 23 Hen. VI. ; and it was *this* statute (*the* statute, not *a* statute) which lord Hobart compared to a tyrant. "I have heard lord Hobart say," says Twisden, J., "that because *the* statute would make sure work, and not leave it to exposition what bonds should be taken, therefore it was added that bonds taken in any other form should be void ; for said he, *the* statute is like a tyrant, &c." ¹ .

That statute prescribes the form of the obligation which an officer shall take from a person arrested, and expressly makes "any obligation, in other form, void." Hence it is said,² "if a sheriff will take a bond for a point against *that* law, and also for a due debt, the whole bond is void ; *for the letter of the statute is so* ; for a statute is a strict law ; but the common law doth divide according to common reason, and having made that void, which is against law, lets the rest stand." ³

To the case of Norton v. Simmes⁴ may be traced most of the *dicta* in the books, on the point now in question. In the three reports of that case, a principle is advanced, general in its terms ; but it is in reference to the statute of Hen. VI.—and the point was not adjudged. The suit, in that case, was on a bond for the performance of several covenants, some of which were void by the common law ; and the plaintiff had judgment for damages sustained by the non-performance of the valid covenants.

The compiler of Bacon's Abridgment (Sheriff, H. 2.) seems to have understood the distinction as existing only

¹ 1 Mod. 35.

² Hob. 14.

³ See Shep. Touch. 374 ; Plowd. 68. acc.

⁴ Hob. 12 ; 1 Brownl. 64 ; Mo. 856.

under the statute of Henry VI. and other statutes (if any) in which a specific form of obligation is prescribed, and all other forms forbidden; and Lawrence, J., in 8 East, 236, 237, expressly asserts the same—which renders it the more remarkable that he should afterwards, in 3 Taunt. 244, have advanced the doctrine as a general one.

If then any part of a contract is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not expressly, or by necessary implication, render the whole void; and provided also, that the sound part can be separated from the unsound. As to the possibility of such separation, however, there is no difference between contracts against the common law, and against a statute.

Such is the true principle; and such, it will be found, are the modern decisions.

Thus—if in a deed a rector or vicar grants a rent-charge out of his benefice, contrary to the statute of 13 Eliz. c. 20, and also covenants personally to pay the rent-charge, he is liable on his covenants, though the grant is void for illegality.¹ So a bill of sale of a ship, by way of mortgage, though void as such, for want of a recital of the certificate of registry required by statute of 26 Geo. III., may be good as a covenant to repay the money borrowed—such covenant being contained in the same instrument.² So if there be in a deed one limitation to a charitable use, and therefore void by statute of 9 Geo. II., yet other limitations in the same deed, which are not within the statute, are not therefore void.³ The case of *Greenwood v. Bishop of London*⁴ is a strong authority to the same point. A conveyance of an advowson, including the next presentation, was made for an

¹ *Mouys v. Leake*, 8 D. & E. 411.

² *Kerrison v. Cole*, 8 East, 231.

³ *Doe v. Pitcher*, 6 Taunt. 359. See opinion of Gibbs, C. J.

⁴ 5 Taunt. 727; *S. P. Newman v. Newman*, 4 M. & S. 292.

entire sum, and was supported for the advowson only ; the conveyance of the next presentation being void for simony, which is a statute offence. There are also several perfectly analogous cases on the property tax act of 46 Geo. III.¹

It appears, from these cases, that when the corrupt part of an agreement can be separated from the sound, the latter shall stand, although the former be declared void by statute. And it may be inferred that a case like that of *Lee and wife v. Coleshill*² would now be differently decided, unless (according to what would seem to be the better opinion) the lawful covenant, in that case, should be deemed dependent on that which was unlawful, and so the void part inseparable from the sound.³

In *Crossley v. Arkwright* and *Dann v. Dolman*,⁴ under the annuity act of 17 Geo. III., it was held that the want of a memorial of an annuity deed, registered according to the directions of the statute, avoided the whole deed, though there were parts of it not connected with the annuity. The court held themselves bound by the words of the statute, which declares annuity deeds, of which a memorial is not registered, "void to all intents and purposes whatsoever." These decisions were questioned by Mr. Evans, in his notes to the annuity act, and by Mr. Ellis in his treatise on the Law of Debtor and Creditor, p. 377, note (o). By the subsequent decisions in analogous cases (already cited) the part of the deed which related to the annuity would alone seem to be within the operation of the statute. "The

¹ *Wigg v. Shuttleworth*, 13 East, 87; *Gaskell v. King*, 11 East, 165; *Howe v. Synge*, 15 East, 440; *Tinkler v. Prentice*, 4 Taunt. 549; *Fuller v. Abbott*, 4 Taunt. 105; *Readshaw v. Balders*, 4 Taunt. 57.

² Cro. Eliz. 529; 2 And. 55.

³ See *Ley*, 79; *Hob. 14 a*, note (2) by Judge Williams; *Bac. Ab. Covenant, G; Offices, &c.*, F.

⁴ 2 D. & E. 603; 5 D. & E. 641.

judges," says lord C. J. Wilmot, "*formerly* thought an act of parliament might be eluded, if they did not make the whole void, if part was void."¹

It is often laid down in the books, that if any part of an agreement is void by *the statute of frauds, &c.*, the whole is void. An examination of the cases, however, will show that this is too broadly asserted, and that the true doctrine does not rest upon any distinction between agreements void in part by statute, and void in part by the common law. The principle of the decisions under the statute of frauds, &c., is the same as in the other cases already noticed, and is this—to wit—if the part of the agreement, which is void by the statute, is so involved with the rest of the agreement (which, if standing alone would be valid,) as not to admit of separation, the whole is void; otherwise not.

The first case on this point is lord Lexington *v.* Clarke,² where a woman, after her husband's death, in consideration of being permitted to occupy premises which were leased to her husband, promised orally to pay the rent which had accrued during his life, as well as the rent which should subsequently accrue during her occupation. The court held this to be an entire agreement; and the promise, as to one part, being void by the statute of frauds, &c., it could not stand good for the other part. In *Cooke v. Tombs*,³ the same rule was applied to an unwritten agreement for the sale of real and personal property; to wit, houses, a dock-yard, &c., and timber for ship-building. On the authority of this last case, Macdonald, C. B., shortly after ruled the point in the same way, at *Nisi Prius*.⁴

¹ 2 Wils. 351.

² 2 Vent. 223.

³ 2 Anstr. 420. According to subsequent decisions, the agreement concerning the personal property was void also, under the statute. But as it was not so regarded by the court, the case supports the decision in *Lexington v. Clarke*. See *Roberts on Frauds*, 111, note (53).

⁴ *Lea v. Barber*, 2 Anstr. 426, note.

Three years afterwards, the court of king's bench decided the point in the same way, in *Chater v. Beckett*.¹ Lord Kenyon said, "the promise was void in part by the statute, and *the agreement being entire*, the plaintiff cannot separate it, and recover on one part of the agreement, the other being void." Grose, J., said "it was *one indivisible contract*, and the plaintiff cannot recover on any part." This doctrine has been fully adopted by the supreme court of New York,² and stands on the same principle which avoids any entire and inseparable contract, when part of it is void for any cause. So lord C. J. Abbott understood the doctrine. In *Mayfield v. Wadsley*,³ he says, the contract being void in part by the statute of frauds might be void *in toto*, "if it had been one entire contract, made at one time, and for one price; but here there were distinct contracts, and separate prices were fixed." Accordingly the former cases were held not to apply to the case then before the court.

The general doctrine, as to agreements that contravene legislative enactments, is, shortly, as follows.

Whenever the consideration of an agreement, or the act undertaken to be done, is in violation of a statute, the agreement is void, and no action can be maintained, by either party, for the breach of it.

It was held, in the time of Elizabeth, that when a statute merely inflicted a penalty for doing an act, or for making a contract of a specified kind, without prohibiting the act or contract, the payment of the penalty was the only legal consequence of a violation of the statute;—that the contract was valid, and might be enforced. Thus, under the statute of 27 Hen. VI., which imposes a penalty for selling property at a fair on Sunday, it was held that the contract of

¹ 7 D. & E. 201; S. P. 10 Barn. & Cres. 664.

² *Crawford v. Morrell*, 8 Johns. 253.

³ 3 Barn. & Cres. 361; S. C. 5 Dowl. & Ry. 228. See also *Wood v. Benson*, 2 Crompt. & Jerv. 94.

sale was not void, though the seller was liable to punishment.¹ So in *Gremare v. Valon*,² lord Ellenborough ruled that an unlicensed surgeon might recover pay for surgical services, though the statute of 3 Hen. VIII. enacts that no person shall practise as a surgeon, without being licensed, under a penalty. In *Bartlett v. Vinor*,³ lord Holt denied this doctrine, and said that "a penalty implies a prohibition, though there are no prohibitory words in the statute." And in *Drury v. Defontaine*,⁴ Mansfield, C. J., declared that the law is changed since the decision in *Comyns v. Boyer*, and "if any act is forbidden under a penalty, a contract to do it is now held void. That case is not now law."

Accordingly it has been decided, under the statute of 39 Geo. III. (which directs that printers shall affix their names to any book which they print, and that if they omit so to do they shall forfeit £20 for each copy,) that a printer, who omits to affix his name to a book, cannot recover for labor and materials used in printing it. Bayley, J., said it made no difference whether the thing was prohibited or enjoined absolutely, or only under a penalty.⁵ The same principle was recognized by lord Eldon, in *Dyster's case*.⁶ So in *Nichols v. Ruggles*,⁷ it was decided that a contract to reprint any literary work, in violation of a copy-right secured to a third person, is void; and that a printer who executes such a contract, knowing the rights of such third person, cannot recover pay for his labor. Yet the act of congress on the subject merely inflicts a penalty on the offender, and contains no prohibitory clause. So of the sale of lands in

¹ *Comyns v. Boyer*, Cro. Eliz. 485.

² 2 Campb. 144. This case was carried to the court in bank, but turned there upon a point of evidence.

³ Carth. 252; Skinner, 322.

⁴ 1 Taunt. 136; *S. P. De Begnis v. Armistead*, 10 Bing. 110.

⁵ *Bensley v. Bignold*, 5 Barn. & Ald. 335.

⁶ 1 Rose's Bankr. Cas. 349.

⁷ 3 Day, 145.

Pennsylvania, under the Connecticut title.¹ By the statute of 22 Car. II. it is enacted that if any person shall sell any sort of grain, usually sold by bushel, by any other bushel or measure than that which is agreeable to the standard marked in the exchequer, he shall forfeit 40s. Under this statute, a contract for the sale of corn by the hobbett, which is not a part of the standard measure, was held to be void; and the court refused to sustain an action against the purchaser, on his refusal to perform his contract.²

By the English statute of 29 Car. II. c. 7, "no tradesman, artificer, workman or laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary calling upon the Lord's day, or any part thereof, works of necessity and charity only excepted," under a penalty.

The decisions on this statute and the *dicta* of judges are not perfectly consistent. The principle seems to be this, to wit, if any person makes a contract, which is within his ordinary calling, on the Lord's day, he cannot enforce that agreement; and that "worldly labor" is not confined to one's ordinary calling, but applies to any business he may carry on.³ But where one purchases an article on that day, and retains it, and afterwards promises to pay for it, he is liable to an action for the price; but not on the original contract.⁴

In Pennsylvania, a note given on the Lord's day is held to be void.⁵ In Connecticut, a plea to an action on a promissory note, that it was executed and delivered on the Lord's day, was held to be a good bar.⁶ But in Massachu-

¹ Mitchell v. Smith, 4 Yeates, 86; 4 Dall. 269; 1 Binn. 110.

² Tyson v. Thomas, 1 McClelland & Younge, 119. S. P. Foster v. Taylor, 5 Barn. & Adolph. 487; Little v. Poole, 9 Barn. & Cres. 192.

³ Fennell v. Ridler, 5 Barn. & Cres. 406; S. C. 8 Dowl. & Ry. 204; Smith v. Sparrow, 4 Bing. 84.

⁴ Williams v. Paul, 6 Bing. 653. See also 1 Horn & Hurlstone, 12.

⁵ Kepner v. Keefer, 6 Watts, 231.

⁶ Wight v. Geer, 1 Root, 474.

setts, such plea was held to be ill, on demurrer.¹ And this would seem to be the sounder judgment. For such plea does not show that the note was given in violation of the statute. *Non constat* that the transaction might not have fallen within the exception, in the statute, as to matters of charity or necessity. There are many supposable cases, in which a note may be given on the Lord's day, without violating either the spirit or the letter of the statute. It would seem, however, that the court in Massachusetts consider that decision as an authority for holding that no act is void merely because it violates the statute for the due observance of the Lord's day.²

In good sense, there can be no difference between an express prohibition of an act by statute (whether under a penalty or not) and the infliction of a penalty for the doing of the same act, without an express prohibition. In many statutes, there are both a prohibition and a penalty; in others, a penalty without a prohibition; and in others a prohibition without a penalty. And it may be now considered as settled by authority, as well as required by policy and legal conformity, that all contracts which contravene the provisions of a statute, however that statute may express the will of the legislature, are void for illegality.³

It is not easy to reconcile the case of *Johnson v. Hudson*⁴ with this doctrine and with the other modern cases, unless it be upon a ground incidentally mentioned by the reporter. The plaintiff, in that case, had, without being licensed, sold a quantity of tobacco, which was part of a larger quantity consigned to him *to be disposed of*. The statute of 29 Geo. III. enacts that every person, who shall deal in

¹ *Geer v. Putnam*, 10 Mass. Rep. 312.

² See 16 Pick. 250.

³ See 3 Chitty's Commercial Law, 83, *et seq.*

⁴ 11 East, 180.

tobacco, shall, before he shall deal therein, take out a license, under a penalty of £50. In a suit against the purchaser, for the price of the tobacco, a defence was interposed that the plaintiff could not legally sell it. The plaintiff obtained a verdict before lord Ellenborough, and a rule was reluctantly granted to show cause why the verdict should not be set aside—the court, saying, there was no clause in the statute making the sale illegal, and that it was, at most, a breach of a regulation protected by a specific penalty. “They also doubted whether the plaintiff could be said to be a dealer in tobacco, within the meaning of the act.” The rule was finally discharged. And on the ground that the plaintiff was not a dealer, within the act, the case does not conflict with the other adjudications.¹

Where a statute expressly prohibits an act, the decisions are uniform, that a contract, founded on a violation of the enactment, cannot be enforced. Thus, as the statute of 10 Geo. II. c. 28, prohibits theatrical entertainments, unless they are licensed by the king or lord chancellor, it was decided that no action lay for a breach of an agreement to dance at Haymarket theatre; there having been no license granted for that theatre.² So where a bank made a loan of bills of foreign banks, contrary to a statute prohibiting such loan, and took a note payable in the same, the promisor was held not to be liable on his note.³ So of a note given for shingles not of the dimensions, nor surveyed, as required by a statute which forbade the sale.⁴ So of a note given as a premium on a policy of insurance of a ship to a port interdicted by an act of congress.⁵

¹ See 5 Barn. & Adolph. 899.

² Gallini v. Laborie, 5 D. & E. 242.

³ Springfield Bank v. Merrick, 14 Mass. Rep. 322.

⁴ Wheeler v. Russell, 17 Mass. Rep. 258; S. P. Law v. Hodson, 2 Campb. 147; 11 East, 300; 9 Barn. & Cres. 192; 5 Barn. & Adolph. 487.

⁵ Russell v. DeGrand, 15 Mass. 35. See also 1 Bos. & Pul. 272; 6 D. & E. 728; 6 M. & S. 162; 4 M. & S. 346; 1 Phillips on Insurance, chap. III, § 2; 1 Comyn on Con. (1st ed.) 39—46.

Most of the cases on this subject are collected, and canvassed with great ability, by the counsel who argued the case of *Wheeler v. Russell*.¹

It makes no difference whether the contract be oral, written, or sealed. If the consideration, or the act to be done, be illegal, the contract is void, whatever form it may have assumed. As "courts will not lend their aid to enforce a contract entered into with a view of carrying into effect any thing which is prohibited by law," they will not allow a party, who sells goods, knowing that the buyer is to use them in contravention of a statute, to recover the price. Thus where an Englishman in Guernsey sold goods, and assisted in packing them in a particular manner for the purpose of their being smuggled into England, it was held that the seller could not recover pay for them.² And the same doctrine was applied, where the seller was a foreigner, who sued on a bill of exchange given for goods which he had assisted in smuggling into England. He could not resort to the laws of England which he had assisted to evade.³ Where an English merchant chartered a vessel of a merchant in New York, while the non-intercourse laws of the United States were in force, for the purpose of conveying a cargo from New York to Fayal, to be transported thence to England, it was held, that he could not maintain an action in this country for the hire of the vessel.⁴

But where the contract and delivery of goods were complete abroad, and the vendor, a foreigner, did no act to assist the smuggling of them, he was held entitled to recover pay for them in England, though he knew that they were to be smuggled.⁵ This case can be reconciled

¹ 17 Mass. 256.

² *Biggs v. Lawrence*, 3 D. & E. 454.

³ *Clingas v. Penaluna*, 4 D. & E. 466; *Waymell v. Reed*, 5 D. & E. 599.

⁴ *Graves v. Delaplaine*, 14 Johns. 146.

⁵ *Holman v. Johnson*, Cowp. 341; *Pellecat v. Angell*, 2 Crompt. Mees. & Rosc. 341.

with the subsequent decisions only on the ground that a foreigner is not bound to *guard* the revenue laws of England, though he cannot actively assist in violating them.

Though Mansfield, C. J., in *Hodgson v. Temple*¹ said "the merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor, &c.; he should share in the illegal transaction;" yet that point was not necessarily involved in the decision—and in *Lightfoot v. Tenant*,² it was decided that a person selling goods in order that they might be exported to a place where by statute they could not be exported legally, could not recover, even on a bond given for the price of them. So of drugs sold and delivered to a brewer, the vendor knowing that they were to be used in a brewery, contrary to the statute of 42 Geo. III. though it did not appear that they were so used.³ So of money lent for the purpose of settling losses on illegal stock-jobbing transactions, and thus applied by the borrower.⁴ "If it be unlawful," says Abbott, C. J., "for one man to pay, how can it be lawful for another to furnish him with the means of payment?" So of money lent to ransom a ship, contrary to the statute of 45 Geo. III.⁵ In *Ex parte Bulmer*,⁶ lord chancellor Erskine held that if the money be not applied to the illegal purpose, the lender may maintain an action on the loan, and he decreed accordingly. But the court of king's bench decided differently in *Ex parte Bell*,⁷ and the remarks of Eyre, C. J., in 1 Bos. & Pul. 556, and of lord Ellenborough, in *Langton*

¹ 1 Marsh. 5; 5 Taunt. 181, S. C.

² 1 Bos. & Pul. 551.

³ *Langton v. Hughes*, 1 M. & S. 493. S. P. 6 Hammond, 444.

⁴ *Cannan v. Bryce*, 3 Barn. & Ald. 179.

⁵ *Webb v. Brooke*, 3 Taunt. 6.

⁶ 13 Ves. Jr. 313.

⁷ 1 M. & S. 751.

v. Hughes,¹ show that lord Erskine's doctrine is not recognized as the law of England.

The principle of the decisions last cited is not peculiar to contracts prohibited by statutes, although those decisions were made in cases which turned on statutory prohibitions.²

There remains only one more topic in the doctrine of unlawful contracts, which it is proposed to mention in these notes, namely, how far the foregoing principles affect subsequent or collateral contracts, the direct and immediate consideration of which is not illegal. This is a subject somewhat intricate, and the adjudications on it are not easily reducible to any clear elementary proposition. The later cases are manifestly more strict than the earlier ones, as the reader cannot have failed to perceive is likewise true of the decisions on the whole doctrine of unlawful agreements.

It may be taken, however, as perfectly settled doctrine, that if a promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by that act, though the promisee knew, and even though he were the contriver and conductor, of such act. As if a smuggler sell goods to one who knows they were smuggled, but who had no agency in running them, he may recover pay for the goods.³ So, where Armstrong, during the war of 1812, imported goods on his own account from the enemy's country, under the false pretext of a capture *jure belli*, and goods were sent by the same ship to Toler, and on a seizure of the goods, Toler, at Armstrong's request, became surety for the payment of the duties, &c. on Armstrong's goods, and also became responsible for the expenses of defending a prosecution for the illegal importation of the goods, and was compelled to pay them; it was held that Toler might maintain an action on Armstrong's promise to refund

¹ 1 M. & S. 596, 597.

² See 1 Bos. & Pul. 556; 3 Taunt. 12; 1 Esp. Rep. 13.

³ 11 Wheat. 271. 276.

the money.¹ Marshall, C. J. said, "The contract made with the government for the payment of duties is a substantive independent contract, entirely distinct from the unlawful importation, the consideration is not affected with the vice of the importation. If the amount of duties be paid by A for B, it is the payment of a debt from B to the government. The criminal importation constitutes no part of this consideration." It was further held, however, that if Toler had been concerned in the scheme of importing the goods, or had any interest in the goods of Armstrong, or if they had been consigned to him, with his privity, that he might protect them for Armstrong, no action could have been supported.

In *Tenant v. Elliott*,² and in *Farmer v. Russell*,³ it is held that where on an illegal contract between two persons, one of them pays money to a third person for the other, the other may recover the money from such third person. The court said that the demand arose simply from the placing of the money in the defendant's hands to be delivered to the plaintiff, and not from the original unlawful contract. Eyre, C. J., admitted that if it were possible to mix the original transaction with the contract on which the action was brought, the plaintiff could not recover.

Several cases on this point have arisen upon the statute of 7 Geo. II. c. 8, "to prevent the infamous practice of stockjobbing." The fifth section of that statute enacts, "that no money or other consideration shall be voluntarily given, paid, had or received, for the compounding, satisfying or making up any difference for not transferring any public stock, or for not performing any contract or agreement stipulated to be performed; and all and every person,

¹ *Armstrong v. Toler*, 11 Wheat. 258. See the case on the seizure of the goods, 1 Wheat. 408; 2 Wheat. 278.

² 1 Bos. & Pul. 3.

³ 1 Bos. & Pul. 296, Rooke, J. dissenting.

who shall voluntarily compound, make up, pay, satisfy, take or receive such difference money, &c. shall forfeit the sum of one hundred pounds."

The first case, which arose on a collateral contract connected with the transactions prohibited by this statute, is *Faikney v. Reynous*.¹ Faikney and Richardson were jointly concerned in stockjobbing transactions, and Faikney voluntarily paid £3000 to divers persons for compounding differences for not delivering stock. Richardson and Reynous gave a bond to Faikney to reimburse him a moiety of the sum thus paid by him; and in a suit on this bond, the court held the defendants liable, on the ground that the bond was not given for payment of the composition money, but for reimbursing the plaintiff a debt of honor paid on Richardson's account. The next case is *Petrie v. Hannay*,² in which an action was sustained on a bill of exchange accepted for reimbursement of a moiety of a sum paid to a broker with the privity and consent of the defendant; the broker having been employed by the plaintiff and defendant to pay differences in a stockjobbing transaction in which they were jointly concerned. Lord Kenyon dissented; but the other judges felt bound by the decision in *Faikney v. Reynous*. In both these cases, the court proceeded (partly at least) on the distinction between contracts for the doing of things *mala in se*, and things merely prohibited by law. This distinction, it has before been seen, is now exploded; though lord Erskine recognized it in *Ex parte Bulmer*, heretofore cited. In *Petrie v. Hannay*, a distinction was also taken between an express request to advance money in payment of an illegal demand, and an implied contract; and the same distinction was suggested by Heath, J. in 2 H. B. 382, and by Mansfield, C. J. in 4 Taunt. 167. But lord Eldon denied that any such distinction existed,³ and

¹ 4 Bur. 2069.² 3 D. & E. 418.³ 2 Bos. & Pul. 373.

Marshall, C. J. said that an express promise to pay is tantamount to a previous request.¹ The real ground of the decisions in *Faikney v. Reynous*, and *Petrie v. Hannay*, was that the plaintiffs' rights of action were taken by the court to be founded altogether on the contract of loan, &c. between them and the defendants, and derived no aid from the illegal transactions in which the parties had been previously engaged, and were not affected by them.

In *Booth v. Hodgson*,² Ashhurst, J., says the ground of decision in *Faikney v. Reynous* was that the defendant had voluntarily given another security; "but it does not follow that the plaintiff could have recovered on the original contract for money paid to the use of the defendant." The same remark is applicable to *Petrie v. Hannay*, where a bill of exchange had been accepted by the defendant. But can this be a valid ground of claim, in any case of this sort? Would it not bind a defendant, in all cases, to pay an unlawful demand, if he should make an express promise to pay—and thus legalize all contracts, however vicious?

The cases of *Faikney v. Reynous* and *Petrie v. Hannay* were never favorably received—have often been questioned by the highest authority—and may now be considered as wholly overturned. In *Mitchell v. Cockburne*,³ Eyre, C. J., said the latter of these cases was decided on the authority of the former, "but perhaps it would have been better if it had been decided otherwise; for when the principle of a case is doubtful, I think it better to overrule it at once, than build upon it at all." In *Booth v. Hodgson*,⁴ lord Kenyon, who dissented from the other judges, in *Petrie v. Hannay*, said he wished to avoid making any other observation on those two cases, than that they were distinguishable from the case then before him. In *Aubert v. Maze*,⁵ lord Eldon

¹ 11 Wheat. 274.

² 6 D. & E. 410.

³ 2 H. B. 379. See also 10 Bing. 110.

⁴ 6 D. & E. 409.

⁵ 2 Bos. & Pul. 373.

said, "it seems to me that if the principle of those cases is to be supported, the act of parliament will be of very little use." Heath and Chambre, Js., also questioned the correctness of those decisions. In *Ex parte Daniel*,¹ lord Eldon again expressed his dissent to those cases. Lord Loughborough also, in *Ex parte Mather*,² said he could not accede to them. And lord Manners, in *Ottley v. Brown*,³ entirely disregarded them. Lord Erskine, however, in *Ex parte Bulmer*⁴ recognized the doctrine of those cases; but the decision made by him, in that case, has not been followed, but overruled—as before mentioned. There are, doubtless, expressions in the opinion given by Marshall, C. J. in *Armstrong v. Toler*,⁵ from which it may be inferred that he considered the cases of Faikney, &c. as sound law.

The direct decisions of the courts in England, in addition to the foregoing dissenting *dicta*, leave those two first decisions on the stockjobbing law without any foundation for their support.

In *Steers v. Lashley*,⁶ five years after *Petrie v. Hannay* was decided, it was held that a bill of exchange accepted for the amount of money paid by a broker for the acceptor, for differences in stockjobbing transactions, could not be recovered, because the bill was "given for the very differences." Lord Kenyon said, "if the plaintiff had lent this money to pay the differences, and had afterwards received the bill for that sum, then, according to the principle established in *Petrie v. Hannay*, he might have recovered." "With great submission to lord Kenyon," says Erskine, chancellor,⁶ (who was counsel in *Steers v. Lashley*) that

¹ 14 Ves. Jr. 192.

² 3 Ves. Jr. 373.

³ 1 Ball & Beatty, 366.

⁴ 13 Ves. Jr. 313.

⁵ 11 Wheat. 258.

⁶ 6 D. & E. 61.

⁷ Sir James Mansfield, C. J. also intimated a distinction between money borrowed to pay an illegal demand, and money advanced to effectuate an illegal transaction. 3 Taunt. 13.

⁸ 13 Ves. Jr. 313.

case is the same with *Faikney v. Reynous* and *Petrie v. Hannay*. And in *Cannan v. Bryce*,¹ it was expressly held that money lent to settle losses on illegal stockjobbing transactions could not be recovered. Ten days after the decision of *Steers v. Lashley*, the court of common pleas decided that where one of two partners in copartnership for insuring ships, &c. contrary to the statute of 6 Geo. I. c. 18, had paid the whole loss, he could not recover of his copartner a moiety of the money so paid.² So in *Booth v. Hodgson*,³ where three partners were concerned in illegal insurances, in the name of one of them, it was held that the ostensible partner could not recover from a broker premiums, received by him for the firm, on such insurances.

In *Brown v. Turner*⁴ the case of *Steers v. Lashley* was confirmed, in a case precisely like it in principle, though the question was made as to its correctness, as well as respecting its application to stockjobbing in the stock called *omnium*. In *Aubert v. Maze*,⁵ the case of *Mitchell v. Cockburne* was revised and confirmed; and an award of an arbitrator was set aside, because he had awarded a sum due from one partner to another for money paid on account of losses incurred in illegal insurances. In *Branton v. Taddy*⁶ it was decided that one of two partners in illegal underwriting could not recover premiums from the assured, though the plaintiff underwrote in his own name only, and the agreement between him and his partner was secret, and unknown to the assured when the policies were made. In *Webb v. Brooke*⁷ it was held that money could not be recovered, which was lent to one prisoner of war by another, for the purpose of obtaining a ransom of the defendant's vessel, contrary to

¹ 3 Barn. & Ald. 179. S. P. 3 Taunt. 6.

² *Mitchell v. Cockburne*, 2 H. B. 379.

³ 6 D. & E. 405.

⁴ 7 D. & E. 630.

⁵ 1 Taunt. 6.

⁶ 2 Bos. & Pul. 371.

⁷ 3 Taunt. 6.

statute, though a bill of exchange had been given for the money, payable to the plaintiff's order. In *Clayton v. Dilly*¹ it was decided that the plaintiff could not recover money paid on the loss of an illegal wager made by the defendant's authority. In *Simpson v. Bloss*,² where the defendant had assumed a part of a bet made and won by the plaintiff in an unlawful wager, and the plaintiff advanced to the defendant his share of the winning, in expectation that the loser would pay the plaintiff, but the loser died insolvent, not having paid; it was held that the plaintiff could not recover back the money so advanced. Though the demand was collateral to the illegal transaction, Gibbs, C. J. said that as the plaintiff could not establish his case without the aid of the unlawful wager, he could not maintain his action. It was further decided in *Ex parte Bell*,³ that money advanced by one partner to the others, for the purpose of paying losses incurred, or to be incurred, in illegal insurances by the firm, could not be recovered back, though it did not appear that the money had been thus applied. And finally it was determined, in *Cannan v. Bryce*,⁴ that money lent by one who was not a party to the transaction, but for the purpose of enabling the borrower to pay a loss incurred in illegal stock-jobbing, could not be recovered. In nearly all these cases, *Faikney v. Reynous*, and *Petrie v. Hannay*, were relied upon by counsel. Various distinctions between those cases and the case under consideration were suggested by the judges, at different times, but their authority was not wholly denied, except in one or two instances. Since the decision in *Cannan v. Bryce*, it is not easy to see any ground left on which those cases can possibly stand.⁵

¹ 4 Taunt. 165.

² 2 Marsh. 542; S. C. 7 Taunt. 246.

³ 1 M. & S. 751.

⁴ 3 Barn. & Ald. 179.

⁵ Before *Cannan v. Bryce* was decided, Mr. Payley, in his *Treatise on Agency*, 104, note, spoke of those cases as overturned. See *Gross v. La Page*, Holt's N. P. Rep. 105, and the reporter's note to that case; 2 Evans's *Pothier*, 1—16.

The foregoing principle is not applicable to a case where a debtor conveys his property for the purpose of defrauding his creditors. As between grantor and grantee, in such case, the transaction is valid. No one but a creditor of the grantor can take advantage of the fraud. Therefore, if the grantee have money in his hands, the proceeds of the property so conveyed, which he has promised to pay to the grantor's children, according to the original agreement between him and the grantor, those children may recover the money; and the grantee cannot defend against them, on the ground that the original transaction was fraudulent.¹

An assignment of a negotiable instrument founded in illegality generally obliges the promisor to pay the assignee, if he take the assignment without notice. The exceptions to this rule arise from the provisions of statutes: As in the case of usurious notes, and bills of exchange, in England, previous to the passing of the statute of 58 Geo. III. c. 93, which changed the law, in such cases; or notes given for money won by gaming, or lent for gaming; or as a consideration or inducement to sign a bankrupt's certificate.² But if the assignee take the assignment without notice of the original vice, he cannot recover of the original promisor.

If a contract that is assigned be not negotiable, the original promisor may defend against the assignee, though he had no notice, in the same manner as against the original promisee.³

Under the statute of 9 Anne, c. 14, "to restrain gaming," money lent for the purpose of gaming may be recovered by the lender, in assumpsit on the loan. The statute renders void all notes, bills, bonds, mortgages, or other securities for money won by gaming, or for reimbursing or repaying

¹ *Fairbanks v. Blackington*, 9 Pick. 93.

² See *Kyd on Bills*, 280—283; *Chit. Con.* (1st ed.) 237; 4 *Mass. Rep.* 371, 372; 13 *Mass. Rep.* 515; *Ord on Usury*, 109.

³ *Fales v. Mayberry*, 2 *Gallison*, 560.

money knowingly lent for gaming or betting. But the statute does not render contracts void.¹ Fair gaming is not prohibited by the common law, and by that law assumpsit lies for money won.²

T. M.

¹ *Barjeau v. Walmsley*, 2 Stra. 1249; *Robinson v. Bland*, 2 Bur. 1077; *Wettenhall v. Wood*, 1 Esp. Rep. 18.

² *Bac. Ab. Gaming*, A.

ART. II.—RIGHTS OF THE SLAVE-HOLDING STATES AND OF THE OWNERS OF SLAVE PROPERTY UNDER THE CONSTITUTION OF THE UNITED STATES.

THE great importance of this subject, and the increased and increasing interest with which it is viewed in every part of our country, justify the belief, that an examination of the provisions of the constitution, on which the owners of slave property were induced to rely when the federal compact was formed, a sketch of the laws which congress has passed to carry out those constitutional provisions, and a review of the judicial decisions which have been made under the constitution and laws, may prove acceptable to the readers of the *Jurist* and not be without utility at the present time. As matter which is introductory and somewhat explanatory, we shall commence by giving an outline of the laws as to slavery, which, at the time the federal constitution was adopted and subsequently thereto, have prevailed in the three most important northern states, we mean New York, Pennsylvania, and Massachusetts.

1. *Laws as to slavery in the northern states.*

The law as to slavery in Massachusetts is stated by chief justice Parsons in a case which came before the supreme court of that state.¹ "Slavery," he says, "was introduced

¹ *Winchendon, &c. v. Hatfield, &c.* 4 Mass. Rep. 123.

into this country soon after its first settlement, and was tolerated until the ratification of the present constitution. The slave was the property of his master, subject to his orders and to reasonable correction for misbehavior, was transferable like a chattel by gift or sale, and was assets in the hands of his executor or administrator. If the master was guilty of a cruel or unreasonable castigation of his slave, he was liable to be punished for the breach of the peace, and I believe the slave was allowed to demand sureties of the peace against a violent and barbarous master, which generally caused a sale to another master. And the issue of the female slave, according to the maxim of the civil law, was the property of her master. Under these regulations, the treatment of slaves was in general mild and humane, and they suffered hardships not greater than hired servants. Slaves were sometimes permitted to enjoy some privileges as a *peculium*, with the profits of which they were enabled to purchase their manumission, and liberty was frequently granted to a faithful slave by the bounty of the master, sometimes in his life, but more commonly by his last will."

"In the first action involving the right of the master, which came before the supreme judicial court after the establishment of the constitution, the judges declared that by virtue of the first article of the declaration of rights, slavery in this state was no more. And afterwards, in an action by the inhabitants of Littleton, brought to recover the expenses of maintaining a negro against Tuttle, his former reputed master, tried in Middlesex, October term, 1796, the chief justice, in directing the jury, stated as the unanimous opinion of the court, that a negro born in the state before the present constitution, was born free although born of a female slave."

The opinion so given by the court in 1796 is stated by chief justice Parsons to have been opposed to the practice

and usage at that day, but it has constituted a rule of decision ever since. The issue of slaves, although born before the adoption of the constitution, are held to have been born free.¹

In New York, it was declared by one of the colonial statutes, that all due encouragement ought to be given to the direct importation of slaves. After the revolution, the government of that state determined upon a different policy.

The act of February 22d, 1788, declared, "that if any person shall sell as a slave within this state, any negro or other person who has been imported or brought into this state after the 1st of June, 1785, such seller, his factor or agent, shall be guilty of a public offence and shall forfeit £100, and the person so imported and sold shall be free."

The act was hostile to the importation and to the exportation of slaves as an article of trade, not to the existence of slavery itself; for it took care to reenact and establish the maxim of the civil law, that the children of every female slave should follow the state and condition of the mother.²

It was not considered to prevent a sheriff from taking or selling a slave under an execution against the owner; and the slave was subject to the control and disposition of the executor or administrator of a deceased owner, in the same manner as other personal property. The prohibition was against a voluntary sale by the master of a slave imported or brought into the state.³

The statute imposed a penalty for harboring slaves or servants, and it was held, moreover, that this was cumulative and did not destroy the common law remedy, which a

¹ *Lanesborough v. Westfield*, 16 Mass. Rep. 74.

² See *Kent, J. in Sable v. Hitchcock*, 2 Johns. Cas. 85; *Concklin v. Havens*, 12 Johns. 314.

³ *Sable v. Hitchcock*, 2 Johns. Cas. 79; *Cæsar v. Peabody*, 11 Johns. 68; *Gelston v. Russell, &c.* 11 Johns. 415.

master had by an action to recover damages for seducing and harboring his servant.¹

The master might confine his slave in jail, and this it appears was done in a case decided as late as 1823.²

By the act for the gradual abolition of slavery, all children born of slaves, subsequent to the 4th of July, 1799, were declared to be free, but to continue servants to the owners of their mothers—males till the age of twenty-eight and females till the age of twenty-five. The act of 1817 made it the duty of the masters of such servants to give them certain education before arriving at the age of eighteen, and in default of so doing, declared the servants free at the age of eighteen; and in order that it might be known when the age was attained which discharged them from further servitude, the person entitled to such service was required, within one year after the passage of the act, or after the birth of the child of a slave, to make an affidavit stating the age of such servant; and in default of making and filing such affidavit, within the time specified, the act declared the person so held to service free at eighteen.³

Even after this act, all then alive who were born in the state prior to the 4th of July, 1799, of females who were slaves at the time of the birth, continued slaves in that state, except such as had been emancipated by their owners.

At last, by an act of the 31st of March, 1817, provision was made for the annihilation of slavery in the state of New York about ten years thereafter, by a section which declared that every negro, mulatto or mustee within the state, born before the 4th of July, 1799, should, from and after the 4th day of July, 1827, be free.⁴

The act of the legislature of Pennsylvania, for the gradual

¹ Scidmore v. Smith, 13 Johns. 322.

² Smith v. Hoff, 1 Cow. 127.

³ Griffin v. Potter, 14 Wend. 209.

⁴ 2 Kent's Com. 257.

abolition of slavery, passed on the first of March, 1780. By this act every person, who at the time of passing it was a slave, was to remain a slave, unless his owner omitted to register him on or before the first day of November next ensuing. Children born after the passing of the act were born free, subject however to a temporary servitude till the age of twenty-eight years. And the issue of such children could not be held to any servitude.¹

Very soon after this act was passed, a number of persons formed a society in Philadelphia, for the purpose of relieving those who were held in illegal slavery. A boy, born in Maryland, of an unmarried mulatto woman, who was a slave, attended his master to Philadelphia in the autumn of 1784, and his complexion being light, the attention of this society was excited, and a writ of *habeas corpus* was taken out at their instance for his relief. The case was afterwards thrown into the form of an action *de homine replegiando*. At the trial, the plaintiff himself was shewn to the jury, that they might, from his appearance, draw a conclusion that he was, at least on one side, the issue of white parents. On the part of the master it was proved, that by the laws of Maryland, the boy was a slave in that state, and it was contended that the *lex loci* must determine the right. The other side allowed the force of the *lex loci* in regulating contracts, but insisted that it could never be extended to injure a third person who was not a party to the contract, and on that side the following propositions were advanced; 1st that, however the case might be according to the civil law, by the common law the issue followed the condition of the father; 2dly that a bastard being *nullius filius* was free; and, 3dly, that things, not persons, are the objects of property. McKean, chief justice, delivered his sentiments in an elaborate charge to the jury, in the course of which he

¹ *Miller v. Dwilling*, 14 Serg. & Rawle, 442.

said: "Slavery is of very ancient origin. By the sacred books of Leviticus and Deuteronomy, it appears to have existed in the first ages of the world; and we know it was established among the Greeks, the Romans and the Germans. In England, there was formerly a species of slavery, distinct from that which was termed villenage, Swinb. p. 84, 6th edition, is the only authority I remember on this point, though I have before had occasion to look into it with attention. But from this distinction has arisen the rule, that the issue follows the condition of the father, and its consequence that the bastard is always free, because in contemplation of law, his father is altogether unknown, and that therefore his slavery shall not be presumed, which must be confined implicitly to the case of villeins. It would perhaps be difficult to account for this singular deviation in the law of England, from the law of every other country upon the same subject. But it is enough for the present occasion to know, that, as villenage never existed in America, no part of the doctrine founded upon that condition can be applicable here. The contrary practice has, indeed, been universal in America; and our practice is so strongly authorized by the civil law, from which this sort of domestic slavery is derived, and is in itself so consistent with the precepts of nature, that we must now consider it as the law of the land."

The jury were left to determine from the evidence, whether the plaintiff's mother was a slave at the time of his birth, according to the laws of the state where he was born; and their verdict upon the evidence was for the defendant.¹

This trial took place in 1786, only the year before that in which the convention was held that formed the federal constitution.

At the time of the convention, the experience of the states

¹ *Pirate alias Belt v. Dalby*, 1 Dall. 167.

south of Pennsylvania was such as to produce a distrust of their northern brethren as to the safety of their property in slaves.

"It was no easy task to reconcile the local interests and discordant prepossessions of the different sections of the United States, but the business was accomplished by acts of concession and mutual condescension."¹

2. Provisions made by the federal convention, and by congress, for the security of the south.

The original articles of confederation contained a clause in the following words :

"If any person guilty of or charged with treason, felony or other high misdemeanor in any state, shall flee from justice and be found in any of the United States, he shall, upon demand of the government or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence."

In the convention of 1787, the committee, to whom were referred the proceedings of the convention for the purpose of reporting a constitution, reported a draft in which the fifteenth article was as follows :

"Any person charged with treason, felony or high misdemeanor in any state, who shall flee from justice and shall be found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offence."

When the draft was before the convention, on the 28th of August, 1787, it was moved to strike out the words "high misdemeanor" and insert the words "other crime;" which motion passed in the affirmative.

On the next day, a motion was made to agree to the

¹ Yeates, J., in *Commonwealth v. Holloway*, 2 Serg. & Rawle, 308.

following proposition, to be inserted after the fifteenth article.

"If any person bound to service or labor, in any of the United States, shall escape into another state, he or she shall not be discharged from such service or labor, in consequence of any regulation subsisting in the state to which they escape, but shall be delivered up to the person justly claiming their service or labor." This proposition was unanimously adopted.

Afterwards a committee was appointed to revise the style of, and arrange the articles agreed to by the house. The second section of the fourth article reported by the committee of revision contained the following clauses :

"A person charged in any state, with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up and removed to the state having jurisdiction of the crime."

"No person legally held to service or labor in one state, escaping into another, shall, in consequence of regulations subsisting therein, be discharged from such service or labor but shall be delivered up on claim of the party to whom such service or labor may be due."

The federal constitution, as adopted, contains the clauses thus reported, with some amendment. In the first clause, the words "to be removed" are in place of the words "and removed." In the second clause, the changes of language are more striking. The word "legally" is struck out and after the word "state," the words "under the laws thereof" inserted, and the expression "regulations subsisting therein" is substituted by the words "any law or regulation therein."

The act of congress approved February 12th, 1793 provides, that whenever the executive authority of any state in the Union shall demand any person as a fugitive from

justice, of the executive authority of any state to which such person shall have fled, and shall moreover produce the copy of an indictment found or an affidavit made before a magistrate of any state, charging the person so demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person so charged fled, it shall be the duty of the executive authority of the state to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

Another section of the same act provides, that when a person held to labor in any of the United States, under the laws thereof, shall escape into any other of the states, the person to whom such labor or service may be due, his agent or attorney, is empowered to seize or arrest such fugitive from labor and to take him or her before any judge of the circuit or district courts of the United States residing or being within the state, or before any magistrate of a county, city or town corporate wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any other state, that the person so seized or arrested doth, under the laws of the state from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the state from which he or she fled.

The last section of the act declares that any person who shall knowingly and willingly obstruct or hinder such

claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested, pursuant to the authority herein given or declared; or shall harbor or conceal such person, after notice that he or she was a fugitive from labor as aforesaid, shall for either of the said offences forfeit and pay the sum of five hundred dollars; which penalty may be recovered by and for the benefit of such claimant, by action of debt in any court proper to try the same; saving moreover to the person claiming such labor or service, his right of action for or on account of the said injuries or either of them.

3. Judicial decisions as to fugitives from labor.

The second section of the fourth article of the constitution is confined to persons held to service or labor in one state, under the laws thereof, who escape into another. When the master voluntarily carries his slave from one state into another, the master must abide by the laws of the latter state, so far as they may affect his right of property in the slave.¹

But if the slave comes from one state into another, in any other way than by the consent of the owner, whether he comes in as a fugitive or runaway or is brought in by those who have no authority so to do, he cannot be discharged under any law of the latter state, but must be delivered up on claim of the party to whom his service or labor may be due.²

It is however only the slave escaping into another state that is provided for. Hence it has been adjudged that birth in Pennsylvania gives freedom to the child of a female slave who escaped before she became pregnant.³

¹ *Ex parte Simmons*, 4 Wash. C. C. R. 396.

² *Butler, &c. v. Delaplaine*, 7 Serg. & Rawle, 378.

³ *Commonwealth v. Holloway*, 2 Serg. & Rawle, 305.

A slave is incapable of contracting so as to impair the right of his master to reclaim him; and if a private individual sue out process or interfere otherwise with the master's claim, under the pretence of a debt contracted by the slave, such interference will be deemed illegal, and the claimant will have a right of action for any injury he may receive by such obstruction.¹

But it is held that slaves are not exempt from the penal laws of any state in which they may happen to be. And this doctrine has been carried so far, that in a case in Pennsylvania in which there was no doubt upon the evidence of the negro being the slave of the claimant, he has been detained in prison to answer a charge of fornication and bastardy. On the part of the master it was contended that such a charge was not sufficient ground to prevent the delivery; for the object of a prosecution for it was the indemnity of the public, and a slave, having no property, could pay nothing. Tilghman, C. J., said: "Fornication has always been prosecuted in this state as a crime. By the law of 1705, it was subject to the punishment of whipping, or a fine of ten pounds, at the election of the culprit. The punishment of whipping has been since abolished, but the act of fornication is still considered as a crime; and where it is accompanied with bastardy, security must be given to indemnify the county against the expense of maintaining the child. It may be hard on the owner to give this security, or lose the service of his slave, but it is an inconvenience to which this kind of property is unavoidably subject. The child must be maintained, and it is more reasonable that the maintenance should be at the expense of the person who has a right to the service of the criminal than at that of the people of this city who have no such right."²

¹ *Glen v. Hodges*, 9 Johns. 62.

² *Commonwealth v. Holloway*, 3 Serg. & Rawle, 4.

If a person shall, in violation of the act of congress, knowingly and willingly obstruct or hinder the claimant in seizing the fugitive, he cannot, when sued for the penalty of five hundred dollars, prescribed by the act, set up as a defence ignorance of the law or even an honest belief that the person claimed as a fugitive did not owe service to the claimant. Such matters are unfit for the inquiry of the jury. It is sufficient to bring the defendant within the provisions of the law, if, having notice either by the verbal declarations of those who had the fugitive in custody or were attempting to seize him, or by circumstances brought home to the defendant, that the person was a fugitive or was arrested as such, he persisted nevertheless in obstructing the seizure or in making a rescue.¹ And the offence is complete, although the claimant should ultimately succeed in arresting or recovering possession of the fugitive.²

If the fugitive, being once in custody, should of his own accord evade his keeper and escape, or being excited by others to do so, should make the attempt, and an obstruction should be interposed to hinder the recaption of the fugitive, the offence would be precisely the same as it would have been had the same obstruction been interposed to the original seizure or arrest; and so on as often as the like hindrance may occur in repeated attempts to make the seizure after an escape has taken place.³

The act of congress confers only a limited authority upon the magistrate to examine into the claim of the alleged owner, and being satisfied on that point, to grant him a certificate to that effect. This is the commencement and termination of his duty. He has no authority to issue a warrant to apprehend the fugitive in the first instance, or to commit him after the examination is concluded and the certificate given. Pending the examination, whilst the

¹ Washington, J., in *Hill v. Low*, 4 Wash. C. C. R. 329.

² *Id.* 330.

³ *Id.* 331.

fugitive is in *custodia legis*, the judges of the courts of the United States held in Pennsylvania, have always considered themselves at liberty to commit from day to day till the examination is closed, or else the fugitive could not safely be indulged with time to get his witnesses to disprove the claim of the asserted owner, should he have any.¹

The effect of a certificate given by a judge or magistrate under the act of congress has been much discussed in the cases which have arisen in the northern states, and decisions have been made upon the subject by the highest judicial tribunals in several of the states.

In 1819, a colored man, claimed by a citizen of Maryland as a fugitive from his service, was arrested by him in the county of Philadelphia and carried before a justice of the peace, who committed the man to prison in order that inquiry might be made into the claim. The man then sued out a *habeas corpus* returnable before a judge of the court of common pleas. The judge, after hearing the parties, gave a certificate that it appeared to him by sufficient testimony, that the man owed labor or service to the claimant from whom he had absconded, and delivered the certificate to the claimant, that he might remove the man to the state of Maryland. A writ *de homine replegiando* was then sued out by the man against the keeper of the prison, and the counsel for the claimant moved to quash it on the ground of its having issued contrary to the constitution and laws of the United States. The matter was regarded by the supreme court of Pennsylvania as of considerable importance, and it was therefore held some days under advisement. Chief justice Tilghman delivered the opinion of the court. "Whatever," said he, "may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to become parties to a

¹ Washington, J., in *Worthington v. Preston*, 4 Wash. C. C. R. 463.

constitution under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured. This constitution has been adopted by the free consent of the citizens of Pennsylvania, and it is the duty of every man, whatever may be his office or station, to give it a fair and candid construction." The chief justice cites the provision in the second section of the fourth article of the constitution, and observes, "here is the principle: the fugitive is to be delivered up on claim of the master. But it required a law to regulate the manner in which this principle should be reduced to practice. It was necessary to establish some mode in which the claim should be made, and the fugitive be delivered up." The judge then quotes the enactment on the subject by congress and concludes the opinion as follows: "It plainly appears, from the whole scope and tenor of the constitution and act of congress, that the fugitive was to be delivered up on a summary proceeding, without the delay of a formal trial in a court of common law. But if he had really a right to freedom, that right was not impaired by this proceeding. He was placed just in the situation in which he stood before he fled, and might prosecute his right in the state to which he belonged. Now, in the present instance, the proceeding before judge Armstrong and the certificate granted by him are in exact conformity to the act of congress. That certificate therefore was a legal warrant to remove the plaintiff to the state of Maryland. But if this writ of *homine replegiando* is to issue from a state court, what is its effect but to arrest the warrant of judge Armstrong, and thus defeat the constitution and law of the United States? The constitution and the law say that the master may remove his slave by virtue of the judge's certificate; but the state court says that he shall not remove him. It appears to us that this is the plain state of the matter, and that the writ has been issued

in violation of the constitution of the United States. We are therefore of opinion that it should be quashed.”¹

In 1823, a case under the same section of the act of congress came before the supreme court of Massachusetts. Randolph, a slave, the property of one McCarty, of the state of Virginia, had fled from the service of his master. After getting to Massachusetts he acquired a dwelling-house in New Bedford, which he held as his own. After living in New Bedford four or five years he was seized by one Griffith under the act of congress. Griffith had authority in writing (with a scroll in the place of a seal) from one Mason, the administrator on the estate of McCarty, and made the seizure as Mason’s agent and attorney. Griffith was indicted for an assault and battery and false imprisonment, and a verdict was taken against him. It was agreed that if the court should determine that the act of congress was not valid, or that the administrator had not power according to the true construction of that act and of the laws of Virginia, by himself, his agent or attorney, to reclaim the slave, or that the letter of attorney was not sufficient to operate in Massachusetts, then the verdict should stand; otherwise that the defendant should be discharged. Parker, C. J., delivered the opinion of a majority of the court, in substance as follows:

“The first question is, whether the defendant was duly empowered as an agent to reclaim the slave. We do not decide whether a scroll is a seal, though probably it would not be so considered in this state. But we think that a letter of attorney was not required to communicate power to this agent. In general, a seal is not necessary, except to authorize the making of a sealed instrument. A common letter or a parol authority is sufficient for making many important contracts. The words of the statute are, ‘the

¹ Case of *Wright v. Deacon*, 5 Serg. & Rawle, 62.

person to whom such labor or service may be due, his agent or attorney.' If a letter of attorney were required, the statute would have used the word attorney only; but the word agent being also used serves to explain the intention of the legislature."

"The question then is whether Mason, having been duly appointed administrator under the laws of Virginia, had a right to come here himself and claim the slave; for the claim by his agent was the same as if made by himself. It has been decided that a foreign administrator cannot come here to collect a debt, and if it was necessary to pursue the slave in the character of administrator, the authorities are clear against the defendant. But by the statute of the United States, the person to whom the service is due may reclaim, and by the laws of Virginia an administrator is such person. Taking both together, Mason might come here to reclaim, and it was not necessary that he should come in the character of an administrator."

"This brings the case to a single point, whether the statute of the United States, giving power to seize a slave without a warrant, is constitutional. It is difficult, in a case like this, for persons who are not inhabitants of slave-holding states to prevent prejudice from having too strong an effect on their minds. We must reflect, however, that the constitution was made with some states in which it would not occur to the mind to inquire whether slaves were property. It was a very serious question, when they came to make the constitution, what should be done with their slaves. They might have kept aloof from the constitution. That instrument was a compromise. It was a compact by which all are bound. We are to consider, then, what was the intention of the constitution. The words of it were used out of delicacy, so as not to offend some in the convention whose feelings were abhorrent to slavery; but we there entered into an agreement that slaves should be con-

sidered as property. Slavery would still have continued, if no constitution had been made."

"The constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined by congress. It is very clear that it was not intended that application should be made to the executive authority of the state. It is said that the act which congress has passed on this subject is contrary to the amendment of the constitution, securing the people in their persons and property against seizures, &c., without a complaint upon oath. But all the parts of the instrument are to be taken together. It is very obvious that slaves are not parties to the constitution, and the amendment has relation to the parties."

"It is said that when a seizure is made it should be made conformably to our laws. This does not follow from the constitution, and the act of congress says that the person to whom the service is due may seize, &c. Whether the statute is a harsh one is not for us to determine."

"But it is objected that a person may, in this summary manner, seize a free man. It may be so, but this would be attended with mischievous consequences to the person making the seizure, and a *habeas corpus* would lie to obtain the release of the person seized.

"We do not perceive that the statute is unconstitutional, and we think that the defence is well made out." ¹

In New York, the writ *de homine replegiando* has been more frequently resorted to than in the other northern states. In 1834, a man, who was brought before the recorder of the city of New York as a fugitive slave, sued out a writ of *homine replegiando*, upon which an issue was joined and tried in the New York circuit, and a verdict found that the man owed service to the person claiming him; on which verdict judgment was rendered. The supreme court of New

¹ *Commonwealth v. Griffith*, 2 Pick. 11.

York decided that the proper course then was for the recorder to grant a certificate allowing the removal of the fugitive.¹

The constitutionality of a law of New York, which provides for the arrest of fugitive slaves in a manner different in some respects from the act of congress, and gives to one claimed as a slave the writ of *homine replegiando* against the person claiming the service, and suspends all proceedings before the judge or magistrate, and the removal of the slave under the certificate until final judgment shall be given on this writ, was discussed in another case before the supreme court of the state of New York, which was heard in the same year.

Judge Nelson, who delivered the opinion of the supreme court on the question as to the effect of the act of congress and of the statute of New York, says, "To ascertain which is entitled to paramount authority, we must go back to the source of power—the provision of the constitution, that being conceded to be supreme, and any law in pursuance thereof controlling. The first clause is merely prohibitory upon the states, and forbids the enactment of any law, or the adoption of any regulation in the case of a fugitive slave, by which he may be discharged from the service of his master; and this prohibition upon the state power thus far is unqualified and complete, as it necessarily includes a restriction against any measure tending in the slightest degree to impair the right to such service. No 'law or regulation' of a state being permitted to discharge it, the claim or title of the owner remains as perfect within the jurisdiction of the state to which the fugitive has fled, after his arrival and during his continuance, as it was in and under the laws of the state from which he escaped. The service there due, and the escape being established, so explicit are the terms of the constitution, no rightful authority can be

¹ *Floyd v. Recorder of New York*, 11 Wend. 180.

exercised by the state to vary the relation existing between the parties. To this very qualified extent slavery may be said still to exist in a state, however effectually it may have been denounced by her constitution and laws. On this point there can be no diversity of opinion as to the intent and meaning of this provision; the doubt arises from the construction to be given to the next clause: 'but shall be delivered up on claim of the party to whom such service or labor may be due.' The counsel for the plaintiff in error contends, that the mode of making the claim and of delivering up the fugitive is a subject exclusively of state regulation, with which congress has no right to interfere; and upon this view the constitutionality of the law of this state is sought to be sustained.

"It is material to look into the object of this clause of the constitution, the evil to be guarded against, and the nature and character of the rights to be protected and enforced, in order to comprehend its meaning and determine what powers and to what extent may be rightfully claimed under it.

"At the adoption of the constitution, a small minority of the states had abolished slavery within their limits, either by positive enactment or judicial adjudication; and the southern states are known to have been more deeply interested in slave labor than those of the north, where slavery yet to some extent existed, but where it must have been seen it would probably soon disappear. It was natural for that portion of the Union to fear that the latter states might, under the influence of this unhappy and exciting subject, be tempted to adopt a course of legislation that would embarrass owners in pursuing their fugitive slaves, if not discharge them from service and invite escape by affording them a place of refuge. They already had some experience of the perplexities in this respect, under the confederation, which contained no provision on the subject; and the

serious and almost insurmountable difficulties that this species of property occasioned in the convention was well calculated to confirm their strongest apprehensions. To this source must be attributed, no doubt, the provision of the constitution, and which directly meets the evil, by not only prohibiting the states from enacting any regulation discharging the slave from service, but by directing that he shall be delivered up to the owner. It implies a doubt whether they would, in the exercise of unrestrained power, regard the rights of the owner or properly protect them by local legislation. The object of the provision being thus palpable, it should receive a construction that will operate most effectually to accomplish the end, consistent with the terms of it. This, we may reasonably infer, will be in accordance with the intent of the makers, and will regard with becoming respect the rights of those especially interested in its execution. Which power, then, was it intended should be charged with the duty of prescribing the mode, in which this injunction of the constitution should be carried into effect and of enforcing its execution—the states or congress? It is very clear, if left to the former, the great purpose of the provision might be defeated, in spite of the constitution. The states might omit any legislation on the subject, and thereby leave the owner without any known means by which to assert his right; or they might so encumber and embarrass the prosecution of them, as that their legislation on the subject should be tantamount to denial. That all this could not be done or omitted without disregarding the spirit of the constitution is true, but the provision itself is founded upon the presumption, that without it the acknowledged rights of the owners would not be observed or protected; it was made in express terms to guard against a possible act of injustice by the state authorities. The idea that the framers of the constitution intended to leave the legislation of this subject to the states, when the

provision itself obviously sprung out of their fears of partial and unjust legislation by the states in respect to it, cannot readily be admitted. It would present an inconsistency of action and an unskilfulness in the adoption of means, too remarkable to have been overlooked by a much less wise body of men. They must naturally have seen and felt that the spirit apprehended to exist in the states, which made the provision expedient, would be able to frustrate its object in regulating the mode and manner of carrying it into effect;—that the remedy of the evil and the security of rights would not be complete unless this power was also vested in the national government.

“I am satisfied, from an attentive perusal of this provision, that a fair interpretation of the terms in which it is expressed not only prohibits the states from legislation upon the question involving the owner’s right to this species of labor, but that it is intended to give to congress the power to provide the delivering up of the slave. It is peremptory and unqualified; that ‘he shall be delivered up on claim of the party to whom such service or labor may be due.’ The right of the owner to reclaim the fugitive in the state to which he has fled has been yielded to him by the states. Without this provision, it would have been competent for them to have wholly denied such claim, or to have qualified it at discretion. All this power they have parted with, and the owner now has not only an unqualified right to the possession but he has the guaranty of the constitution in respect to it. It is obvious, if congress have not the power to prescribe the mode and manner of the ‘delivering up,’ and thereby provide the means of enforcing the execution of the rights secured by this provision, its solemn guaranty may be wholly disregarded in defiance of the government. This power seems indispensable to enable it faithfully to discharge the obligation to the states and citizens interested. The subject itself, as well from its nature as from the per-

sons alone interested in it, seems appropriately to belong to the national government. It concerns rights held under the laws to be enforced within the jurisdiction of states, other than those in which the citizens generally interested in them reside, and on a subject too known deeply to affect the public mind, and in respect to which distinct and adverse interests and views had already appeared in the union. It was therefore fit and proper that the whole matter should be placed under the control of congress, where the rights and interests of the different sections of the country, liable to be influenced by local and peculiar causes, would be regulated with an independent and impartial regard to all. It was a subject affecting citizens at the time, more or less, in almost every part of the union—a uniform rule respecting which was desirable, and could only be attained by placing it under the action of the national government. We may add also, that as the power of legislation belonging to the states is in no instance derived from the constitution of the United States, but flows from their own sovereign authority, any law they might pass on the subject would not be binding beyond their jurisdiction, and any precept or authority given in pursuance of it would convey none to the owner to remove the fugitive beyond it; the authority of each state, through which it was necessary to pass, would become indispensable.

“Great consideration, also, we think due to the law of 1793, as a contemporaneous exposition of the constitutional provision. It was passed about four years after the adoption of the constitution by a congress which included some of the most distinguished members of the convention. At the distance of forty years, we should hesitate long before we come to the conclusion, that an error was committed in the construction of this instrument under such circumstances, and which has been ever since acquiesced in, so far as we know, without question. Our own statute books also shew,

that down to 1830, no attempt had been made here by state legislation to interfere with this regulation of congress.

"Shall the certificate of the magistrate under the law of 1793, which declares it 'shall be a sufficient warrant for removing the fugitive from labor to the state or territory from which he fled,' be permitted to perform its office? or shall the writ under the state law prevent it? They are antagonist and irreconcilable powers, and the case forcibly exemplifies the impracticability and danger of the exercise of both upon the same subject, and the wisdom of the rule that forbids it. It has been said that under the law of 1793, a free citizen might be seized and carried away into captivity, and hence the necessity of the law of the state giving to him a trial by jury upon the question of freedom.

"The proceedings are before a magistrate of our own state, presumed to possess a common sympathy with his fellow-citizens, and where, upon the supposition that a free man is arrested, he may readily procure the evidence of his freedom. If the magistrate should finally err in granting the certificate, the party can still resort to the protection of the national judiciary. The proceedings by which his rights have been invaded being under a law of congress, the remedy for error or injustice belongs peculiarly to that high tribunal. Under their ample shield, the apprehension of captivity and oppression cannot be alarming.

"It is sufficient for this case that the plaintiff was brought before an officer authorized by the law of congress, to hear and determine the question and grant the certificate; that such hearing did take place, and that the certificate was granted.

"According to the view of the case we have taken, the question of slave or not according to the laws of the state from whence the fugitive fled, belonged to the magistrate under the law of congress to decide, and his decision is

conclusive in the matter so far as the state courts are concerned.”¹

These extracts are from the opinion of a gentleman who has since been appointed to the high and responsible office of chief justice of the state. The opinion from which the extracts are made, is in all its parts, creditable to the judge who gave it, for the force of its views and the ability with which they are urged, but it is still more creditable on other grounds. The judge has shewn throughout, that the local prejudices and prepossessions of those amongst whom his lot has placed him, are not sufficient to swerve him from a right decision, but that his duty to uphold the constitution and laws of the union will be honestly and independently performed.

The length of this article admonishes us that it is proper now to pause. We do so, however, with the expectation of being able to resume the subject in a succeeding number.

C. E.

¹ Jack v. Martin, 12 Wend. 311.

ART. III.—THE LEGAL RULES GOVERNING THE ENJOYMENT AND USE OF LIGHT.

[A Lecture delivered before the Law Association of the city of New York, February, 1839. By WILLIAM CURTIS NOYES.]

THE subject which I have chosen for your consideration a short time this evening was forced upon my attention originally by professional duties, and has been recalled to my recollection by a recent event in Wall street, which has caused some excitement and elicited no little remark. Those of my audience who have had occasion to pass through that great resort of money-changers, may have remarked the erection of a wall apparently useless except to “shut out the light” from the upper story of the new

banking house, recently put up by the Bank of the United States. The right to build this wall has been loudly questioned, while on the other hand the right of building a window so as to overlook the grounds of another, has as loudly been denied. A multitude of opinions have been expressed in regard to these matters, not only among commercial men, but among those of our own profession. These opinions have been vague and discordant and nearly as various as the individuals expressing them. It is believed an acceptable service may be rendered to those who are pursuing the law as the business of their lives, by an examination of the legal rules governing the enjoyment and use of light, and in endeavoring to settle the true principles by which the rights of individuals to this common and indispensable blessing are regulated and protected.

It has happened in this instance, as in too many others, that much fault has been imputed to the law for the alleged uncertainty with which this branch of it is said to be surrounded. The stale and oft-repeated witticisms, with which our profession is so frequently attacked, have again been gone over, much to the amusement of those who have indulged in them. Upon an attentive and lawyer-like examination of this interesting branch of jurisprudence, however, it will be found that the rules which govern it are now very well settled, and have their foundation in those immutable principles of right which commend themselves to the regard of all good men, and without which, no rule of law can long sustain the scrutiny of forensic discussion.

A degree of interest has at times been imparted to this subject by the air of antiquity, not to say mystery, which has sometimes been thrown about it. Many of us can recollect the sensations produced by the title "ancient lights," which met us in the abridgments and indexes to the legal works which we have found occasion to consult, and while all supposed it a branch of the title of the law

regarding real estate which once had an existence, few, it is believed, supposed it had been transplanted into our legal soil; much less that it would ever be cultivated and an attempt made to cause it to increase and flourish. Such an attempt, however, has recently been made, and the question has received the deliberate attention and decision of the supreme court, and the law, so far as the same can be adjudicated by that tribunal, authoritatively declared. I shall find it necessary in the course of this lecture, to give a history of the legal questions involved in that decision, and to state what effect it has in its bearing upon the points under consideration. My plan embraces,

1. A brief consideration of the origin and nature of the object to which it is necessary legal protection should be extended.
2. The legal rights of parties to the enjoyment and use of it; and
3. The remedies for an infringement of those rights.

1. A correct understanding of the origin and nature of the object to be enjoyed and in which a property is claimed is always essential to a just interpretation of the right to it, and of the remedy to be pursued for a violation of that right. In regard to light it is obvious that there is no such thing as a separate property in it; it cannot be claimed in a legal sense, independent of something corporeal, any more than the atmosphere or water. As ejectionment will not lie for the latter, so it will not for the former, and for the same reason, yet they both may be recovered in that action as a necessary incident to land. And although I have not found it classed among incorporeal hereditaments by name, except in a single instance by Mr. Chitty, in his *General Practice*, vol. i. 206, yet it is clearly within the definition given by lord Coke—a right issuing out of a thing corporate, whether real or personal, or concerning, or annexed

to, or exercisable within the same.¹ So it is equally within the definition given according to Blackstone by logicians: Corporeal hereditaments are the substance which may be always seen, always handled; incorporeal, a sort of accidents, which unite in and are supported by that substance, and may belong or not belong to it without any visible alteration therein. Their existence is merely an idea, an abstract contemplation, though their effects and profits which are totally distinct may be objects of our bodily senses.² From the nature therefore of the thing itself, it is clear, that it is only as an incident to real estate and essential to its use, that light can be the object of the protecting care of the law. And as such incident to real estate, the legal right to it is secured by the comprehensive maxim which governs in such cases, and which includes not only things below the surface, but above it, water, air and light: *cujus est solum ejus est usque ad cælum, et ad inferos*. (He who owns the soil, has it even to the sky and to the lowest depths.)

2. The annunciation of the maxim just repeated has anticipated somewhat the *second* division of my subject—the legal rights of persons to the enjoyment and use of light.

And it has already been evident, that the proprietor of land has a right to the full and free enjoyment of all the light, which in its ordinary condition would come to the estate of which he is possessed, and that as a general rule he would be entitled to an action for any violation of this right. To this rule there are however important exceptions, and one meets us at the threshold of the matter. The right being equal in the case of adjoining proprietors of land, how are their respective obligations and duties as between each other regulated? The obvious answer is, without the intimation of any claim arising from prescrip-

¹ Coke Lit. 19, 20.

² 2 Com. 20.

tion, or long continued use, that each would be authorized to use side lights or not, as he chose, in case he built on the margin of his land or otherwise, and the other by building on his own soil would equally be at liberty to stop the lights, if he could, if malice or wantonness or any other reason should prompt him to do so. This is a rule now perfectly well settled, upon the principle, that their rights to the enjoyment of the respective lands are the same, and neither is entitled to prevent the other from enjoying his own property in such manner as he chooses. The law upon this subject was declared in New York in *Mahan v. Brown*, and will be found quaintly and succinctly stated in the case of *Bury v. Pope*,¹ which I shall hereafter quote more at length. It must be borne in mind, however, that this rule only applies to those cases, where the lands are in a state of nature, without buildings, and where they are held under titles not derived from the same source. The rule in such cases deserves a distinct consideration and will be stated hereafter.

I have thus far laid down the rule only in respect to lands originally unoccupied, and in cases where the owners themselves commence the erection of buildings requiring lights. There is another and much more extensive class of cases: that in which buildings have been erected, with lights in them, the free use of which is invaded; for the sake of convenience I shall arrange these into different heads:

(1.) Those where the building is an *ancient* building, and the lights also *ancient* lights. In this country, except perhaps in some of the towns which were settled by the early colonists, such lights can hardly be said to exist, as they must have been in use beyond the time of legal memory—certainly not a very definite period—undoubtedly, however, commencing with the reign of Richard the First,

¹ 13 Wend. 261.

² Cro. Eliz. 118.

and in regard to subsequent transactions, being a period beyond which there is no knowledge when the thing did not exist, nor any record, law, deed or charter showing the contrary. If such an ancient light can be found in this state or in others where the common law of England prevails, it is not doubted, that even an adjoining proprietor, who had suffered his land to lie vacant, would not be permitted to build upon it so as entirely to stop or even essentially diminish the light, which his neighbor had been accustomed to enjoy by means of his ancient window. By the common law of England, this is an undisputed position. The cases are numerous, commencing with the earliest reports, and quoted and confirmed to the present time. They may be consulted in 1 Shower's Reports 7, and 2 Chitty on Pleading (new ed.) 367, and notes, and indeed are referred to in nearly all the elementary treatises. In the case in Shower, it is said: "If lights be stopt by the erection of a building on a man's own soil against the windows of another, it must be averred that they were *ancient*, for otherwise he has a right to build upon his own soil." This rule of the common law was adopted by us and became a part of the law of New York at the ratification of the constitution of the state by the people, the twenty-fifth section of which provided, that such parts of the common law as formed the law of the colony of New York on the 19th of April, 1775, should be and continue the law of this state.

It must be observed, however, that these ancient lights, and indeed all others which are entitled to protection from any cause, must always be used as they originally existed. They cannot be enlarged or extended in any way, so as to admit more light than originally passed through them. Even if the building in which they existed is destroyed or from any other cause requires rebuilding—a new one erected on the old foundation must have its windows in the same place and of the same dimensions, and admit

the same quantity of light. This rule would seem to be a fatal enemy to modern improvements in building, but it nevertheless is well settled upon principle and authority. The general rule is that a new building on the same site is entitled to the same rights as its predecessor and¹ no more. And it has been held, that if a building which has been used twenty years as a malt-house (to which time, as will be mentioned presently more at large, the protection is extended in England) is converted into a dwelling-house, it is in its new condition entitled only to the same degree of light as was necessary to it in its former state, and that the owner of the adjoining ground might therefore lawfully erect a wall which prevented the admission of sufficient light for domestic purposes, if what was still admitted would have been enough for the making of malt.² This rule is founded upon principles of natural justice, to the propriety of which all must assent. In the case of a light strictly an *ancient one*, and in that of others, whether the exclusive protection to which they are entitled arises from prescription or length of user, which is generally regarded as evidence of a grant, the use had its origin in an encroachment upon the rights of another and an acquiescence, of which the user is evidence, or in a grant coextensive only with the use; and it would obviously be unjust to permit an extension of the use beyond the original enjoyment, for that would be allowing the party a benefit to which he had no legal claim. The law therefore strictly confines the use to its original limits.

- 6 (2.) A second class of cases where buildings have been erected requiring lights, and the use of which is infringed upon, is that where the lights have been used for more than *twenty* years. By the common law of England, as it was formerly declared by some of the wisest and ablest

¹ 1 Chitty's Pr. 208.

² 1 Camp. N. P. R. 322.

judges which that country has produced, such lights were not entitled to any exclusive protection, nor did the user furnish any evidence of a right to prevent the adjoining proprietor from building on his own soil, to the prejudice of those lights. As the history of the decisions upon this point furnishes an instructive and interesting lesson upon the subject of departures from principle, as well as from the earlier and better considered cases, I shall examine them a little in detail. It will not be necessary for this purpose to go any further back than the case of Bury v. Pope,¹ already referred to. That was an action on the case for stopping the plaintiff's lights, and the reporter says, which indeed is the whole case: "It was agreed by all the justices, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land and makes windows and lights looking into the other's lands, and this house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows and the other can have no action; for it was his folly to build his house so near to the other's lands and it was adjudged accordingly." With this rational rule, all the earlier cases concur and so far as I have been able to discover, this decision remained the law of England, for more than a century after it was pronounced. Now, however, it will be found that a different rule is stated to prevail there, and all the recent elementary works and some of the reports, contain opinions and *dicta* to sustain that altered rule. It is stated by Mr. Mathews, in this manner: "The right to lights or windows overlooking another person's land is a privilege, which, though generally obtained by purchase, originates not unfrequently either in a temporary permission by the adjoin-

¹ Cro. Eliz. 118.

ing land owner, or in the mere usurpation of the party. In both these cases, unless perhaps the permission in the former has been lately acknowledged, the effect of long unmolested possession is to confer a legal title to the supply of light. It has accordingly been held in a numerous series of adjudications, that enjoyment of light for twenty years affords presumptive evidence of an agreement, license, or grant." This is also the language of the English books generally. The same doctrine is substantially adopted by chancellor Kent in his commentaries, though he seemed to consider it by no means as safe and equitable in its general application, and he remarks upon it in a note:¹ "The common law right of prescription in favor of ancient lights, does not reasonably or equitably apply, and it is not the presumed intention of the owners of city lots, that it ever should be applied to buildings on narrow lots in the rapidly growing cities of this country. By such a prescriptive claim, the value of vacant lots with old and low buildings upon them would be destroyed, if substantial buildings could not be erected on them, lest they might obstruct the lights and prospect of the side lights of some building on an adjoining lot which had stood twenty years." So general had the notion become among our own profession, that the same doctrine was taken for granted in the case of *Mahan v. Brown*, already referred to, by the late chief justice Savage. That case did not indeed call for any such opinion, no such point being involved in it, but the chief justice said, after adverting to the old rule: "Now, however, it is perfectly settled, that as the occupant may acquire a right to the house itself by twenty years uninterrupted possession under claim of title, so in the same time he shall by occupation acquire a right to an easement belonging to the house. It is true that twenty years posses-

¹ 3d Com. 2d ed. 446.

sion does not confer a right absolutely, but it raises a presumption of a grant. The person who thus opens a window overlooking the privacy of his neighbor enjoys an easement in that which does not belong to him. Yet no action lies for this encroachment upon the rights of the person whose lands have thus been overlooked; the encroachment will in twenty years ripen into a right; and it is said that the only remedy is to build on the adjoining land opposite the offensive window." Although as an opinion, this had no binding authority, it was regarded by the profession, so far as my knowledge extends, as decisive of the rule in this state also. I have seen the report in a newspaper of a case in Louisiana, where the same rule was laid down, and a recovery had upon it. Upon an examination, however, of the case in which the new rule was first promulgated in England, it will be seen not only to be a departure from the common law, but founded altogether in false analogy. That case arose at *nisi prius* in England, in 1761, before Wilmot, J., and by the name of *Lewis v. Price*, was first reported in a note to the 2d Saunders's reports, 175, by serjeant Williams, the learned editor of the most valuable edition of that work. The report was not published, however, until the year 1799. The reason given by judge Wilmot is, "that twenty years is sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house." In a later case at *nisi prius*, he alluded to the same reason and said, "if my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd." These *nisi prius* decisions could not properly be considered as altering the old rule, especially as the question seems never to have been deliberately argued and considered by the judges in bank. Nor could they operate in such manner as to change the common law and

render the new rule obligatory upon us, by reason of the adoption by that article of the constitution to which I have referred. Still they have since been implicitly followed in England. And the reason there upon which the rule is to rest, is the same as that which prevails to sustain a defence of adverse possession in ejectment, or a presumption of a grant from a co-tenant, where there has been an ouster and an adverse holding by his fellow,—or a presumption of a grant arising from actual adverse occupation of a water-course, common, way or fishery. In cases not within the statute of limitations, these presumptions were adopted by analogy to that statute and in order to quiet the possession. “They are adopted” as judge Story says, “from the general infirmity of our nature, the difficulty of preserving muniments of title and the public policy of supporting long and uninterrupted possession. They are founded upon the consideration that the facts are such that they could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to or an admission of an existing adverse title in the party in possession.”¹ Moreover, in all these cases, there is an actual possession of something and the other party is deprived of some substantial benefit. And for this encroachment upon his rights—for depasturing his common, flowing his land, using his field as a way, or taking fish upon his premises, he may maintain an action and recover damages, and thus prevent a continuance of that which unnoticed would at the end of twenty years ripen into a right. But the overlooking one’s grounds by means of a window has none of these incidents. As has been shown, it is using nothing in the natural state of the soil, but what the party is entitled to; there is indeed no manual or pedal occupation; it is simply—if such a possession can be—merely ocular. The person

¹ Ricard v. Williams, 7 Wheat. 109.

whose grounds are overlooked cannot have a remedy by action for doing it—he has no means of preventing it, except by making a useless erection against the offensive window—and in short is wholly without any legal remedy whatever by action or otherwise. The overlooking one's grounds under such circumstances furnishes very little, if it does any evidence, of a claim of title or right to do so; which claim of title is an indispensable prerequisite to a defence of adverse possession and to authorize a presumption of a grant to land or to an easement. It would seem to result, therefore, that the reason given by judge Wilmot in support of his opinion, was the very one which should not have been given, and that instead of its being “absurd,” that the reason which would give a title to the house should not to the lights also, it was grossly absurd that it should, where there is such a great dissimilarity in the facts. And one can hardly restrain his surprise at the false analogy by which the learned judge was misled, when he recurs to the rule which is well settled, that in cases under the statute of limitations, there must have been an usurpation of right by one party to the prejudice of the other, and for which the latter might have maintained an action before the expiration of the time prescribed by the statute or the original right is not barred, and that where such enjoyment by one party has occasioned no injury or inconvenience of which the other could have complained, there is no such acquiescence by the latter as to raise any presumption whatever.¹

Without pursuing the history of this branch of my subject further, it is only necessary to add, that in the case² to which I alluded as attempting to introduce the English rule here, the question was brought directly before the supreme

¹ 2 Saund. 175, note, *Bradley v. Greensil*; 3 Camp. R. 80, *Chandler v. Thompson*.

² This case has been reported since the delivery of this lecture, in 19th Wendell's Reports, 309, *Parker & Edgerton v. Foote*.

court within the last year, where the law underwent a full discussion, and the result was that in a learned opinion delivered by judge Bronson, the English rule was pronounced unsound and was repudiated, the *obiter* opinion of chief justice Savage overruled, and the doctrine of presumptions declared to have just application to such a case. Still the rule prevails in England, and has recently received the sanction of a legislative enactment, probably from some doubt as to its validity independent of a statute.¹ By the custom of London, however, it never prevailed in that city, a person being authorized to build to any height upon ancient foundations, although he should thereby exclude the light from his neighbor's windows; provided the *four* walls belonged to him, but he was not thus privileged if he owned only *three* of the walls.

It may therefore be considered as clear that in New York there is no legal presumption of a title, or license arising from the use of lights and that however long they may have been enjoyed, unless they come strictly within the denomination of ancient lights, the owner of the adjoining soil may erect a wall against them.

I may be permitted to remark here, for the encouragement of bold and independent thought and investigation on the part of the members of our profession, that this history furnishes a salutary example of the danger of following cases implicitly, without an inquiry into the principles upon which they are based. The greatest and wisest judges frequently fall into error, and it is our province to point them out and thus to correct and amend them. Let your minds be well stored with legal principles, and there is little danger of being lost or long led astray among the mass of cases, with which we are and I fear will continue to be overburthened. Scrutinize every case with rigor, take no

¹ 1 Chitty's Pr. 207.

man's mere opinion for law, apply to it the infallible test of principle, and if it will not stand this trial, it may safely be disregarded and eventually will find its appropriate place among "cases overruled."

(3.) A *third* class of cases where lights are protected is, where a man builds next to a vacant piece of ground of his own and then sells the house thus built and the ground upon which it stands, reserving to himself the vacant parcel. He cannot after this sale build upon the vacant lot so as to stop or diminish the usefulness of the lights in the house which he sold, for by the sale of the house, all the lights, and the necessary incidents to make them useful, pass; and, as he cannot build himself to the prejudice of the house so sold, so cannot the vendee of the vacant ground do it. The same rule obtains if he sells a house thus built by another. And this proceeds upon the familiar principle, that a vendor of real estate is not permitted to do any thing to impair the value of his own conveyance, or rather of that which necessarily passes with it, and as he cannot, so cannot his vendee as he takes the adjoining premises *cum onere*.¹ Upon the same principle, a landlord, who had demised premises adjoining a vacant lot of his own or next to a smaller building than the one demised, would not be permitted to build upon the former or rebuild the latter, in such a manner as to interfere with the tenant's lights during the continuance of the lease. In all these cases it is immaterial in respect to the right what has been the period of the enjoyment of the lights.²

It is believed, that what has already been said embraces substantially every case in which the right to lights may come in question, and furnishes principles by which the right to the use may readily be determined.

¹ 6 Mod. 314; 3 Selwyn, 972; 12 Mass. R. 157, *Story v. Odin*.

² 1 Price, 27, *Compton v. Richards*; 1 Lev. 122, *Palmer v. Fletcher*; 1 Ser. 137, *Cox v. Mathews*.

I have omitted any notice of the cases in which the right arising from the use of lights is or is not binding upon the reversioner, or where the use commences during a particular estate, and upon persons under age or coverture; and for the reason, that as the doctrine of presumptive right arising from user is not applicable in New York, an examination of these cases is unnecessary. On the same account, I have not noticed another class of cases, where the presumptive right arising from user is deemed to have been abandoned or released by *non-user*. It is only necessary to remark, in regard to these, that acquiescence by the tenant does not in England as a general rule bind the reversioner, and that a clear and indubitable abandonment of the use for a less time than twenty years will be deemed a relinquishment. In the case of *ancient lights*, if one pulls down the wall containing them and instead builds a plain one, unless some contemporary act be done, evincing an intention to resume the lights within a reasonable time, the right will be determined from the first.¹

It only remains for me to consider, 3dly, the remedies which are furnished by the law for an infringement upon the use of lights to which a party is entitled.

The *first* and most obvious one is that by an action on the case, at the suit of the party grieved, wherein he recovers such damages as in the opinion of a jury he may have sustained by the obstruction. This action lies in all cases and the plaintiff may declare generally alleging that the window is entitled to be used, so as to admit light, &c., and that its usefulness has been impaired by an act of the defendant, and is authorized to recover upon proving it an ancient window or entitled to protection from any other cause.² This action may be maintained as well against

¹ 3 Barn. v. Cres. 232; Mathews on Pr. Ev. 322.

² 12 Mass. 159, and cases there cited.

the person who erects, as the one who continues the obstruction; being a nuisance it never becomes lawful to continue it and he who does so is liable in damages. Another advantage of this remedy is that it is a continuing one, and after one recovery another suit may be prosecuted for the damages sustained after the commencement of the prior suit and a fresh recovery had. In such second or subsequent suit, the record in the former case is conclusive evidence of the right to recover; and the plaintiff may proceed in this way *ad libitum* until the offensive erection shall be removed. The measure of damages in the first action would generally be the actual injury which had been sustained by the deprivation of the accustomed light. If however the violation was wanton, even in that case, exemplary damages would be proper. In the subsequent actions, the jury would be authorized to give, in addition to the actual injury sustained by continuing the obstruction, vindictive damages against the defendant, for not taking heed to the legal admonition which he had previously received and removing the erection.

This remedy by action on the case may not only be pursued by the tenant of the particular estate for the injury which he has sustained, but the reversioner may also sustain it for the injury to his reversionary interest; and he may in like manner repeat the action for a continuance.¹

The action upon the case is proper in all cases where the obstruction is committed on the premises of the owner of the lights.

A *second* remedy is by action of trespass when the injury is caused by fastening a wooden or other obstruction into the owner's wall or window. This action however would only lie at the suit of the party actually in possession; the

¹ 2 B. & Adolph. 97, *Shadwell v. Hutchinson*; Dyer 320 (a); 10 Mass. R. 72, *Staple v. Spring*; Salk. 460.

reversioner upon general principles could only recover in case. And under our statute, though trespass by the tenant in possession would be a proper remedy, still he might bring an action on the case; the former distinctions between those actions being now obliterated by the enactment declaring that case may be brought in all cases where trespass lies.¹ The rule of damages in trespass is substantially the same as in case.

A *third* remedy is that by an *abatement* by the act of the party himself of the nuisance which occasions the obstruction, and this though it be a mere private nuisance.² This must be done in a peaceable and proper manner and in such a way as not to occasion a breach of the peace.³ If the offensive erection is on the land of another, the premises of the wrong doer may be entered, if that is necessary, to its removal.⁴ The reason why this is permitted is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. But the illegal act, which may eventuate in a nuisance, cannot be prevented by anticipation, by the act of the party. However probable it may be, that a building about being erected will obstruct a privileged light, still the party who may be injured by it cannot forcibly prevent its erection. It must in some sensible degree have become a nuisance in order to authorize any manual interference. Before any actual injury has arisen the party apprehending it should apply to a court of equity for relief; a preventive remedy which I shall presently consider.⁵

It should be observed in this connection and by way of showing what erections are within this right of abatement

¹ 2 R. S. 456, § 16.

² Chitty's Pr. 727, note (u.)

³ 9 Wend. 315, 571.

⁴ 1 Chitty's Pr. 207.

⁵ Chitty's Pr. 649.

by the act of the suffering party, that no action lies, nor is any remedy furnished by the law, for diminishing or entirely shutting out the prospect given by a window, however ancient it may be.¹ Upon this principle it is held, that though a person may have a right to light and air to pass through his window into his building, yet the occupier of the adjoining land may prevent such party from overlooking his premises, by so placing boards or other obstructions under the window, as to prevent such overlooking; but taking care to commit no trespass upon the building containing the window.² It would not therefore be lawful to remove or disturb such erections.

This right to abate a private nuisance is confined to the party aggrieved by it and those who act in his aid and assistance.

The *fourth* and last remedy to which I shall advert is that by an application to the court of chancery for an injunction to prevent the completion of the work which would cause an obstruction of the light, until the right has been tried at law. The bill in such case must shew the right of the party to enjoy the light, and the particular manner by which he is sought to be aggrieved. Upon notice to the other party, injunctions have been granted to restrain the erection of the building. The jurisdiction of the court of chancery in this respect, however, is very cautiously exercised, and if the legal right be doubtful, or if the nature of the alleged injury be such as not to require the preventive interference of the court or if the light is only partially affected, or there has been any considerable delay, an injunction will be refused and the party left to his remedy at law.³

¹ 9 Co. 58, 6.

² 1 Chitty's Pr. 649; 9 B. & Cres. 691, *Aclett v. Ellis*.

³ 2 *Strange*, 335, 336, *Wynstanly v. Lee*; 2 Russ. 121, *Rack v. Story*; 1 *Dick*. 165; 16 *Vesey*, 333; 2 *Vesey*, 453; 1 Chitty, Pr. 727, 8.

The court of chancery will not however make an adverse order to pull down what has been done,¹ but there is one instance where an injunction in the negative was granted, commanding the defendant "not to permit it to remain."² This example however would not probably be followed.

If the nuisance were of a public character it would be indictable, and then after conviction there would be a judgment that it be removed. In cases therefore where the party injured and his friends could not abate it, his only direct course to get rid of it would be in a court of equity.

In cases where an injunction would not be granted before a trial at law, and in all others, after a verdict has been rendered finding the nuisance, and not before, a court of equity will order it to be removed.³

I have thus endeavored to furnish an outline of the present state of the law, upon this subject. It is submitted, with the humble hope, that it may be somewhat useful in the discharge of your professional duties, and aid in promoting the laudable objects of this association.

¹ 2 Vesey, 533, *Ryder v. Bentham*.

² 1 Clark & Fin. 13, *Rankin v. Huskisson*.

³ 1 Cox. 102; 2 Vesey Jr. 193; *Carey*, 26.

ART. III.—BIOGRAPHICAL SKETCH OF NATHANIEL BYFIELD.

ALTHOUGH the subject of this notice was never a member of the superior court of the province, his connexion with the other branches of its judiciary entitle him to a place among the notices of the judges of Massachusetts.

He was born in England in 1653, and was the son of Richard Byfield, one of the clergymen who constituted the famous Westminster assembly of divines. His mother was a sister of bishop Juxon, and he was the youngest of a family of twenty-one children.

He arrived at Boston in 1674, where he resided until he became a proprietor of the town of Bristol, then within the limits of the Plymouth colony, at its incorporation in 1680. About that time he removed to that town, where he settled upon and became the proprietor of the beautiful peninsula of Poppysquash. Although educated as a merchant, and possessed of a considerable fortune, he engaged in the practice of the law after removing to Bristol, and upon the division of the Plymouth colony into counties, in 1685, he was made chief justice of the court of common pleas for the county of Bristol. One of his associates upon the bench was the famous warrior Church, with whose exploits against the Indians, our early histories have rendered every one familiar.

Upon the union of the Massachusetts and Plymouth colonies under the charter of 1692, although colonel Byfield continued to hold his place upon the bench of the common pleas, he entered with much spirit into the politics of the day, and in 1693, having been chosen to represent Bristol in the general court, he was made speaker of the house of representatives.

By the provisions of the province charter, the establishment of courts of admiralty was reserved to the crown, from whom the judges of that court were to derive their appointments. A court of admiralty was early organized, and at first embraced New York, Connecticut, Rhode Island, Massachusetts and New Hampshire, which, together, constituted one district. The judge of this district appointed his deputies for particular portions of the territory, and in 1699 colonel Byfield was made a deputy judge of this court.

In 1703 a division of this district was effected, and a commission to colonel Byfield, as judge of the "northern district," consisting of Massachusetts, Rhode Island, and New Hampshire, was received by him. This office he held until 1715, when, as it would seem, on account of his

political opinions, he was superseded in his place upon the admiralty bench. In the year 1702 he was made judge of probate for the county of Bristol, and held the office till 1710.

The vicissitudes of political favor at length restored him to the place in the court of admiralty, from which he had been ejected, and he was again commissioned as judge, in 1729. He continued to hold this office from that time until his death. As he still held his office upon the bench of the common pleas, it will be perceived, that for many years he was judge of probate, of the common pleas, and of admiralty, at the same time. And, as will be remarked hereafter, he was, during all this time, actively engaged in political life, holding political offices, and embroiled in all the excitements of a bitter political warfare.

In 1731 he removed from Bristol to Boston, and upon the accession of governor Belcher, with whom he was connected by family, he was appointed to the place of chief justice of the court of common pleas for the county of Suffolk; having for one of his associates the distinguished Elisha Cooke, the younger of the two who bore that name.

Although not constantly a member of the court of common pleas while he resided in the county of Bristol, it is said he held the office of chief justice of that court for thirty-eight years, the last period of his office having been from 1716 to 1725. He remained upon the bench of Suffolk county until his death, which took place in 1733, at the advanced age of eighty.

Although it is not easy to conceive how, among his other avocations and engagements, he could have qualified himself as a lawyer, to fill the places which he occupied, yet, it would seem from the character of Mompesson, whom he succeeded, and Menzies, by whom he was superseded, that legal acquirements were regarded in making appointments to the bench of the admiralty court. Mompesson is said to have been "the best lawyer in America," and Menzies was

regularly educated to the profession, and had been a "member of the Faculty of Advocates" in Scotland. How much politics or family influence¹ had to do with his numerous appointments, it is difficult to determine, but it was true that he was quite as distinguished a politician as a judge.

He seems to have possessed an inordinate share of ambition, and more perseverance than prudence. His first election to the house of representatives has been mentioned. In the years 1696, 7, and 8, he represented Boston in that body, and in the last of these years was again chosen speaker.

He became a zealous supporter of that party which embraced the democracy of the province, at the head of which were the Cookes, the father and son, the latter of whom has already been mentioned.

While the leaders of this party aimed only to secure the rights of the people, Byfield sought by means of it to obtain office and accomplish his purposes of revenge upon his personal and political enemies.

He was for many years a member of the council, and, although at the accession of governor Dudley he seems to have been his friend, in consequence of a harsh and severe reproof from the governor in open council, on account of some judicial proceedings, he conceived a most implacable hatred towards him, which he carried so far as to attempt to supplant him in his office.

For this purpose he visited England in 1714, and an amusing account is given by the distinguished Jeremy Dummer, in a letter to Dr. Colman. "I had your letter by colonel Byfield, for which and for all other letters and favors I thank you. The second time that gentleman and I met

¹ He is stated by Hutchinson to have been father-in-law to lieutenant governor Tailer.

was at my chambers, where we soon came to a full understanding of each other with respect to the present governor. I told him that both my duty and inclination bid me to stand by his commission, with what friends and interest I could make; and he replied that by the help of God, he would get him turned out, and therein please God and all men. Accordingly we have both been pretty diligent, but I think he is now out of breath. His age makes him impatient of the fatigues of application, and his frugality makes him sick of coach hire, fees to officers, and door keepers and other expenses, so that I believe he now heartily wishes himself safe in his own government at Poppysquash. He is really an honest worthy man, but he is so excessively hot against colonel Dudley that he cannot use any body civilly that is for him."

Although Dudley was unable to retain his office, Byfield met with but little success in his endeavors to obtain the place, and sorely to his displeasure, colonel Shute was appointed as Dudley's successor, in the place of colonel Burgess, who, though appointed, never came to Massachusetts.

Colonel Shute found the state of party feeling highly exasperated in the province, and did little to allay it. Indeed there is scarcely a period in the history of Massachusetts when the violence of party spirit was greater than during the administration of governor Shute. The year 1720 was distinguished for the height to which these dissensions rose. Byfield having returned from England was chosen to the council that year, and his election was negatived by the governor. He was again chosen, and again negatived in the two following years. Nor did he find any more favor in 1723, when the government was left in the hands of lieutenant governor Dummer. From that period, however, he was permitted to take his seat at the council board until 1729, when his name was omitted by the house from the list of counsellors. This seems to have closed his

career of politics. And one can scarcely refrain from remarking how little of personal satisfaction or lasting honor is to be gained in such a career. He partook deeply in all the agitations and conflicts of the day, and devoted to the success of his party those powers which otherwise directed might have made him a happier and far more useful man.

Like other political managers, he encountered much obloquy and bitterness of reproach. He excited the jealousy of Cotton Mather, and was an object of personal hatred and abuse from Jeremy Dummer, the agent of the province, at London. One extract has already been given from the correspondence of this gentleman, and another will justify the correctness of the above remark. "What colonel Byfield says of me as well as of sir William Ashurst is false, and I can assure you I found him out in a good many lies whilst he was here, notwithstanding he was nauseously boasting of his honesty."

One thing in the character of judge Byfield ought not to be omitted, as it indicated a more enlarged and liberal spirit than was generally prevalent in the province at that time, and that is his consistent and uniform opposition to the spirit of fanaticism which displayed itself in the trials and punishment of the unhappy victims of the witchcraft delusion.

In his pecuniary affairs he was frugal to parsimony; and though his talents were respectable, they were not of that commanding character that made him a prominent leader among his political associates.

Of commanding person, imposing manners, an ardent temperament and an enterprising disposition, he is said to have preserved a large share of public respect through his long and diversified life. Little, however, is preserved of him as a politician, and far less is known of him as a judge.

E. W.

ART. V.—ON THE OBEDIENCE DUE FROM SEAMEN TO THE MASTER OF A VESSEL.

[Extracted from a work now in preparation on Merchant Seamen, by GEORGE T. CURTIS, Esq.]

It is an obligation assumed by the seamen, to obey all lawful commands of the master, and not to violate the discipline and economy of the ship. This obligation is almost uniformly made a part of the written contract;¹ but apart from all express contract, it results from the nature of the master's authority over the crew, and their relation to the ship.² This authority and the rights which result from it are indispensable, and ascend to the most remote periods in the history of maritime law. The provisions of different positive codes, in respect to the mode of exercising it, have varied with times and manners; but they have always been based upon this principle, that the master must be invested with a power, which implies an implicit obedience on the part of all subject to his authority, within the limits of lawful commands. By some older writers, this authority is likened to that of a parent, or of a master over his pupils or apprentices—“*quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares* ;”³ but a more modern celebrated jurist prefers the analogy of the parental relation.⁴ The distinction is not perhaps very important: for whatever be the exact description of the master's authority, it is the duty of the seamen to obey his

¹ Abbot on Shipping, p. 187 and Appendix, No. V; Steel's Ship-Master's Assistant, (Lond. 1837) p. 23, 33.

² Valin, Comm. tom. 1, p. 447.

³ Casaregis, cited by Valin, tom. 1, p. 449.

⁴ Pardessus, Lois Maritimes, tom. 1, p. 332, note.

commands, in all lawful matters relating to the navigation of the ship and the preservation of good order.¹

The question may often be of much practical importance, whether the duty of obedience on the part of seamen extends at all beyond the service of their own ship; as where the master should order them to go to the aid of another vessel in distress. The duty of obedience is stated by lord Tenterden, as just cited, to attach to all lawful commands relating to the navigation of the ship and the preservation of good order; and this is all that is usually contracted for by any express stipulation in the articles. If we go back to the acknowledged sources of the maritime law, we find the duty thus stated in the *Consolato*: "the seaman is obliged to obey every order of the master or mate, provided it be not for the service of another ship; but he is obliged to render all the service which relates to the ship for which he is hired."² Another chapter of the same compilation contains an exception to the general rule, founded on the necessity of rendering aid to other vessels. It declares that seamen may be sent out of their own ship to another, when the master of such other vessel has need of a person who knows how to do something indispensable to his manœuvres, which his own crew cannot do.³ So, too, another chapter empowers the mate to send the seamen to tow another vessel into port, provided it be not an enemy vessel.⁴ These are the only traces of an exception to the general rule, which I have met with in the old law. They confirm the opinion that is to be deduced from the whole tendency of modern jurisprudence, on the subject of salvage efforts: namely, that those efforts, at least where life

¹ Abbot on Ship. p. 136.

² *Consolato*, chap. 117, [162] Pardessus tom. 2, p. 145; see also chap. 110, [155] *Ib.* p. 140.

³ Chap. 103 [148] Pardessus tom. 2, p. 137.

⁴ Chap. 114 [159] *Pard.* tom. 2, p. 143.

is to be saved, are so far a maritime duty incumbent on the master of a vessel, and resting on the usage of the world, that a deviation for this purpose does not discharge his insurance.¹ But is it any thing more than a moral duty, in the master, or the crew? Could a refusal by seamen to render such services, when commanded by their own officers, draw after it a total or partial forfeiture of wages, as a refusal to do duty on board their own vessel would do? Would it authorize any punishment by the master? Would a refusal by the master himself to render salvage assistance, give the party who stood in need of it a claim for damages capable of being enforced? A duty, that cannot be enforced by the law, is not a legal duty, though it may have the most imperative claims as a moral obligation. The *Consolato* affixes no punishment or penalty to a breach of the orders which the officers are authorized to give, in the chapters above cited: though in the countries where that code was received as a text of positive law, disobedience on such points might perhaps have been punished under the general penalties against disobedience or insubordination. Still, however, the question, as one aside from all positive law, must, I apprehend, revert to the contract itself which the seaman has stipulated to perform: and it is difficult to see why his plea that he had hired his services only to the ship to which he was attached, would not be a perfect answer to any punishment or forfeiture that should be sought to be inflicted on a disobedience of orders concerning any other vessel or service whatever. When such disobedience should also connect itself with disobedience of orders in the service of his own vessel, it might have an important bearing, as showing the general spirit of the party, and perhaps might enhance a forfeiture grounded on the latter instances of insubordination; but as a substantive

¹ The *Boston and Cargo*, 1 Sumner's R. 328.

ground of forfeiture or punishment, I cannot see that it has any foundation.

In stating this limitation of the duty of obedience, I have intended to say nothing that shall impair the moral obligation of services, whether large or small, to life or property in peril on the seas ; which have ever been rewarded with a large munificence by the law, and the selfish and wilful refusal of which has ever been visited with the contempt and execration of mankind.

ART. VI.—INTRODUCTION TO PRIVATE INTERNATIONAL LAW.

No. 2.

[By Mr. Victor Foucher, King's advocate-general in the royal court of Rennes.]

OF SOVEREIGNTY AND ITS LIMITS.

WHEN men, obeying the impulse of their nature, unite their individual powers and wills, to form a civil society, nation, or people, sovereignty is introduced among them, under a double relation.

On the one hand, sovereignty is constituted by the fusion of all the wills and powers into one common will and power, which commands each private will ; and which is made known externally by the organ charged with the publication of the general will.

On the other hand, sovereignty is personified in regard to other nations, in order to make the attributes and the rights inherent in its existence respected.

This supreme power does not in any degree deprive men of their liberty, since it is only the compound of their united powers, and the law which includes their wills in general,

includes by consequence the power of each in particular: thus, "whoever is comprised in the law is not governed by a foreign power; he is governed by his own will,—by his part in the empire."¹

In the same manner, the end of society being the good of all, it is this end, which, while it gives birth to sovereignty, sanctions obedience to the constituted authorities; and, consequently, the first law, which is promulgated of itself with sovereignty, is, that as the union of all the particular powers constitutes the civil state, none of the associates can do himself justice, but ought to demand it of the depositary of the united powers for the security of all.

Sovereignty, in its most extended signification, consists in the union of all the rights belonging to an independent state, in relation to its end; and comprehends at the same time the power of government, or the authority which the end of the state demands, and the entire independence of the state in regard to foreign nations.²

Sovereignty being endowed with all the rights belonging to a nation, it is necessary to inquire what these rights are, in order to trace the limits of sovereignty.

The rights of a nation bear upon men and upon things, and its sovereign power extends to the goods whether private or public, which are found within its territory, and also to all the persons who inhabit it or come within its limits.

In regard to things, the rights of the nation are founded in the exclusive property and the independence of the territory, which forms the patrimony of the state, the soil of the country (*Jus in patrimonium reipublicæ*).

From the exclusive property of the territory, result *Dominion, Empire, Jurisdiction*.

¹ Gravina : *Origines Juris Civilis*.

² Klüber : *Droit de Gens*, Partie 1re, §1.

Domain, in virtue of which the nation may alone make use of the country for its wants,—dispose of it,—draw from it all the uses to which it is proper;—consequently, in virtue of which the nation may exclude all foreign states or individuals, from the use and appropriation of the territory and of all the things which are situated within it;

Empire, which gives the right of sovereign command, by which the nation ordains and disposes at its pleasure of every thing which takes place in the country;

Jurisdiction, which, the result of the union of empire with domain, gives the right to render justice within the national territory, to repress infractions of the laws of the country, and to take cognizance of all controversies which may arise therein.

In regard to persons, the rights of the nation are founded :

1. So far as citizens are concerned, on the act of civil association, (for the purpose of which each individual submits himself to the entire body,) which determines the rights of each; an act, which, whilst it binds both society and its members, comprises a renunciation, on the part of the former, of the exercise of the right to change its organization, so long as the constitutional conditions are not violated, and binds each individual not to undertake any thing injuriously affecting the order of society, because the social act includes an engagement of submission and obedience to the power established for its support.¹

2. In regard to strangers, the rights of the nation are founded on the exclusive and independent property of the country,—on the rights which flow therefrom,—and on the tacit submission to the rights of the nation, from the moment when one touches the soil to the moment when one leaves it; for as each state is free to accord or refuse an

¹ See Rayneval : *Instit. du droit de la Nat. et des gens*, liv. 1, chap. 2; Domat : *Des Lois*, chap. 1.

entrance into its territory, since it is the sovereign proprietor of it; when a stranger is admitted to make use of this faculty, he binds himself by the act of entering upon the territory, to respect the laws of the country, as well as to do nothing to disturb its general harmony.

From the right over persons, result political rights, civil rights, and personal capacities :—

Political rights, which authorize and require an active and personal participation in public affairs;

Civil rights, which confer the enjoyment of the advantages attached to the quality of citizen;

Personal capacities, which confer the competence to do certain acts,—and to discharge certain public or civil employments.

The natural limits of all these rights are the boundaries of the national territory : *nullum statutum hoc in rem, hoc in personam, si ratione juris civilis sermo instituat, sese extendit ultra statuendis territorium*;¹ for, beyond these limits, there are other states, which claim over the country they possess identical rights founded upon the same basis, namely, independence and equality, sociality, justice, and the duties of humanity, which prevent the rights of these states from being disregarded.

Still, however absolute may be the rights of nations over their own territory, we have seen, that men were led by their destiny to a community of relations, and that the citizens of different states were perpetually in contact and communication; so that international law, in consecrating the general principles hitherto developed, and in combining them with justice and the duties of humanity, has drawn from them certain other principles, by which the sovereignty of the states in regard to each other is limited.

In regard to the right over things, the code of nations

¹ Voet : De Statutis et eorum concursu, parag. 7, chap. 2.

admits, in general, the entire disposition of every thing that touches the territory, or of the rights which result from the property of the soil, for the benefit of each state within its territorial limits. For, whatever may be the rights of private property, on the part of those who possess the goods in each country, the goods are always those of the nation, so far as foreign states are concerned, because they make a part of its total riches, and augment its territory; and, further, if *property* is the attribute of individuals, *empire* is of the exclusive essence of sovereignty: *ad reges enim potestas omnium pertinet, ad singulos proprietatis*.

“To the citizen,” (says Portalis, in the motives of the civil code) “belongs property, to the sovereign, empire; such is the maxim of all countries and of all times.” But the individual properties of the citizens, united and contiguous, form the public territory of a state, and, relatively to foreign nations, this territory forms a single one of every thing which is under the empire of the sovereign or of the state. Sovereignty is a right which is at the same time real and personal; and, consequently, no part of the territory can be withdrawn from the administration of the sovereign, nor can any person inhabiting the territory be withdrawn from his supervision or from his authority. Sovereignty is indivisible; but it would cease to be so, if a portion of the same territory might be governed by laws which did not emanate from the same sovereign. It is of the very essence of things, that the immovable property which constitutes the public territory of a people should be governed exclusively by the laws of that people, though a part of it may be possessed by foreigners.

In consequence of this right of absolute disposition of the territory, which makes each state the master to grant or to refuse to strangers the faculty of possessing lands or other goods belonging to its territory, the latter cannot complain of conditions annexed to the faculty of possessing,

any more than they can of an absolute exclusion from all possession ; and, thus, whilst there are some countries, in which the acquisition of immovable property is interdicted to foreigners, there are others, in which foreigners are permitted to possess with an entire liberty of disposition, or only subject to the condition that their succession shall return to the state, within whose territory the goods possessed are situated, or within which the possessor dies : hence the right of escheat (*droit d'aubaine*), a right, moreover, which is disappearing entirely from the code of nations, and giving place to that of reciprocity.

Such, however, is the force of the action of civilization, that, at the present day, all the European powers, whilst they maintain their right of absolute disposition of their respective territories, generally accord in time of peace the liberty of entry, of passage, and of residence, as well by sea as by land, and over rivers flowing through several states. This liberty is confirmed by a multitude of treaties of peace, of boundaries, and of commerce ; and, even, where there is no treaty, it rests on a usage generally acknowledged, and, in some states, on their own fundamental laws.

In regard to the rights over persons, it is the province of the code of nations to modify the absolutism of individual right, so as to make it respect the right of all, and, principally to make each state concede the preservation of personal capacities, and also the acknowledgment of the validity of acts passed by persons according to the laws of the place where they happen to be. For, by temporarily quitting his own country, for the purpose of simple relations with other states, a citizen does not thereby abdicate the rights conceded by the mother country, and does not the less remain subject to the obligations contracted towards it. Hence results the principle, that the state of a citizen fol-

lows him every where;¹ and hence also the acknowledgment of the right consecrated by the judges of the country.

It is true, that the French legislation still disregards the great principle of justice, and that its code contains an exception, which puts us to the ban of other nations, and gives rise among the greater part of them to an exceptional legislation in regard to the French. But the actual French law, worthy of the conqueror who desired to reign over all nations, and to resuscitate the Roman empire with his exceptional legislation, cannot subsist at the present day, when the preëminence of one nation over another is effaced before the influence exerted by the principles of brotherhood, of independence, and of sociality, the foundation of all relations between civilized nations.

Under these divers points of view, therefore, sovereignty extends its empire beyond the limits of national territory; but this extension of right, resulting only from a supposed consent of all nations, being founded only upon a right of convenience, and not belonging, like first general principles, to the divine constitution of society (*divina providentia constituta*), may be and is every day modified by the conventions of states, or by private laws, of which France offers us an example.

This consent of nations, which, in the absence of external, positive conventions, regulates their relations, and which the publicists denominate *consensus gentium*, *jus gentium consuetudinarium*, *rechts-gewonheiten*, *comity of nations*, has its foundation in sociality. Blackstone calls it "a kind of secondary law of nature." It cannot, therefore, be disregarded, though the conflicting rights of different states have frequently brought in question its reality and its obligatory force.

¹ "Personal laws follow the person every where; thus, the French law, with the eyes of a mother, follows the French citizen even into the most remote regions,—to the extremities of the globe." Portalis: *Exposé des Motifs du code civil*.

Among the authors, who doubt whether the consent of nations can form a basis for a law of nations, Hertius is one of the most prominent: *Verum enim nos valde dubitamus (dixit) num res hæc ex jure gentium sine mutua earum indulgentia possit definiri, præsertim cum in una eademque civitate collisio sæpissime fiat;*¹ and, consequently, he undertakes to impose upon nations fixed rules, without occupying himself with the obligatory sanction of these rules for the state; but this opinion has with reason been controverted by the greater number of authors, and by the precedents of the jurisprudence of nations, which have adopted the opinion of Huberus, whose principle concerning the extraneity of certain statutes is expressed in the following terms: *Rectores imperiorum id comiter agunt, ut jura cujusque populi, intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium prejudicatur.*²

President Bouhier, in his commentaries on the custom of Burgundy, expresses the same opinion: "But above all things, it must be recollected, that though the strict rule demands the restriction of customs within their limits, the extension of them has nevertheless been admitted in favor of public utility, and frequently even by a kind of necessity; so that when neighboring nations have allowed of this extension, it is not because they have subjected themselves to a foreign statute, but because they have found such extension to be for their particular interest. It may therefore be said, that this extension is founded upon a kind of law of nations and of convenience, in virtue of which the different nations are tacitly agreed to suffer this extension from custom to custom whenever equity and common utility should demand it, at least unless the custom to which the extension is demanded contains a prohibitory disposition."

¹ De Collisione Legum, parag. 4, art. 3 et 4.

² De Conflictu Legum, parag. 2.

In fact, without the admission of the *jus consuetudinarium*, nations, wanting in rules for cases not foreseen by the positive law, would suffer embarrassments much greater than those which would arise from the conflict of their private laws; since each of them would no longer have any thing but its own caprice for its guidance; whereas, the right resulting from sociality being admitted, nations, as soon as they come in contact, may regulate their relations, form their conventions upon preëxisting bases, and find themselves immediately in communion with the generality of civilized states.

The Roman law also acknowledges this source of right, and Mackeldey cites a great number of authorities in support of his proposition, that customs have a force equal to that of an express law.¹ We shall content ourselves with the following fragment of the digest: *Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo.*

If we take up, now, each of the rights of nations, (whether founded upon the primitive law or upon general usage), we shall see, that the rights of sovereignty and their limits may be summed up in the following aphorisms of Boullenois.

1. The sovereign has power and authority over the subjects and over the goods which they possess under his domination.

2. It is for the sovereign to determine the form and the solemnities of contracts, which the subjects enter into on the lands subject to his domination. It is for him also to prescribe the rules of proceeding in justice.

3. The sovereign has also the right to make laws for the government of foreigners in several cases, *first*, in relation to goods which they possess any where within his sove-

¹ Manual of Roman Law (in German), Introd. parag. 6.

reignty; *second*, in relation to contracts which they enter into within his territory; *third*, in relation to judicial acts, if they plead before his judges.

4. The sovereign has also the right to make laws for the government of foreigners, who merely pass through his states, but commonly simple laws of police only for the preservation of good order; and these laws are either perpetual, or made only for certain particular occurrences.

5. Of strict right, none of the laws made by a sovereign have any force or authority, except within the extent of his domination; but the necessity of the public and general good of nations has introduced some exceptions in that which concerns civil commerce.

OF PUBLIC LAWS AND OF PRIVATE LAWS.

If the concessions of nations concerning their reciprocal rights, commonly called servitudes of public or national law,¹ have for their limits the laws constitutive of each nation; and the right of sovereign over the citizens and over the territory, it will be in a knowledge of the laws which determine the social form, fix the state of persons, and regulate the property of the soil, that we shall find the complement of the principles concerning sovereignty and its limits.

And, in the first place, what is law?

Law, like right itself, is susceptible of many modifications in its definition, according to the point of view, under which we regard it. In fact, law may be referred to natural order, political order, or civil order; and the definition which is proper to it in one case will cease to belong to it in another.

¹ See Engelbrecht, *De Servitutibus juris publici*, Helmstad, 1713 et 1799; G. H. Felz, *De Servitutibus juris publici, seu de jure in alieno territorio*, Argenton, 1701 et 1737; Martens, *Precis du Droit des Gens*, Liv. iii, chap. iii, parag. 83.

Thus, the nations of antiquity, and, especially, the Hebrews, the Greeks, and the Romans, gave different denominations to law, according to the object to which it referred. The law *Tora* among the Jews was the rule of all the public and private relations which united the members of society together, and of all the principles upon which these relations were founded. It was, therefore, the fundamental law of that state. On the contrary, the laws, statutes, precepts, which they called *Michpol*, *Choukim*, and *Mitzod*, formed different branches of legislation, which emanated from the first law, the source of all the others.¹

Thus, at Athens, the perpetual law was called *Nomos*, the temporary and partial *psephisma*, as the tablets upon which were engraven the laws relative to public affairs were called *kurbeis*. So, at Rome, the laws called *curiata centuriata* (or *populiscites*), *tributa*, (or *plebiscites*), then, the *consulares*, *pretoria*, *tribunitia*, and, afterwards, the edicts and the rescripts of the emperors, which took the place of the different laws, as the sovereign power was concentrated in their hands, or, in their names, in the hands of their miserable freedmen, or pretorian guards, give by their denominations alone a just idea of the form of the Roman society, at its different epochs.

Thus, Plato, defining law the distribution of mind, regarded it as general reason, on which account Gravina interprets the word mind by that of justice.²

Thus, Cicero, who denominates law in its broadest sense the force of nature (*naturæ vis*), establishes at the same time, that, more commonly, laws are those written rules, which command or prohibit (*et eam legem, quæ scripto quod vult aut jubendo aut vetando, ut vulgo appellare.*³)

¹ Salvador ; Histoire des Inst. de Moïse, Liv. 1., Reformation de la Loi.

² See Gravina, Origines Juris Civilis.

³ De Legibus, tit. 1. § 6.

Thus, the divine Thomas, in describing the law, *quædam regula et mensura secundum quam inducitur ad agendum vel ab agendo retrahitur*,¹ presents it in a point of light, which has in no degree lost its brilliancy or its truth.

Thus, St. Isidore, in making of the law *constitutio populi quam majores natu cum plebibus sanxerunt*,² recalls those beautiful passages of Cicero, and of Tacitus, which seem to be prophetic of representative government.

Thus, Montesquieu, after having said with Cicero, that the general law is human reason, in so far as it governs all the nations of the earth, and that the political and civil laws of each nation are nothing more than particular cases of the application of human reason, divides law into the law of nature, and positive law, according as it concerns the constitution of our being, or the relations of men to one another.³

Thus, Domat calls immutable laws those which are derived from nature, and arbitrary laws those which are the act of man.⁴

Thus, Toullier defines law, in its most extended sense, "a rule of action prescribed by a lawful superior;"⁵ which, perhaps, makes some confusion of the divers objects to which the word law may be referred, and despoils it of its intuitive or philosophic character, to reduce it nearly to its juridical acceptation.

For our part, law seems to us here, in its juridical acceptation, *as a rule derived from the power of the state*.

Mackeldey adds, according to the Roman law, *and to which the subjects of the same state are bound to conform themselves*; but this second part of the definition is not so

¹ 1. 2—9, 20 art. 1.

² De Lege, lib. 2. chap. 10.

³ Esprit des Lois, Liv. 1. ch. 1, 2, et 3.

⁴ Traité des Lois, chap. xi.

⁵ Droit Civil Français, Nos. 2, 3, et 4.

exact as the former, because it is too absolute; for the law has not always for its effect to command the will, to prohibit, to permit, or to punish, but frequently only to indicate the general rule, in default of a will expressed.

In fact, the rules traced by the legislator have a double object; some relate to the very formation of society, and to the support of the institutions upon which it is founded; while the purpose of others is only not to leave uncertain or in suspense the rights and the actions resulting from particular agreements, or from the exercise of the will abandoned to free individual discretion, wherever these rights and these actions have not been regulated by the use of a free discretion.

“Civil law,” says Rayneval, “being necessary to maintain the civil rights of the citizens, it ought to be extended to all the objects which may establish relations, and, consequently, give rise to controversies between them; but, in all the cases, which do not interest society, it ought neither to be imperative nor prohibitive. It ought to be applied only in default of conventions between the parties interested; for conventions are the first laws of the citizens; and they are not considered to have renounced the liberty of making them, except in regard to objects which are contrary to constitutional principles, or to good manners. With the exception of these two cases, the common law ought to be only suppletory, that is to say, it ought not to serve as a rule but in default of express conventions. According to this principle, the legislator ought to be more occupied with determining the form of conventions, with a view to the establishment of their truth, than in regulating their substance, that is to say, the will or intention of the parties.”¹

Hence the division of laws into public and private.

¹ *Inst. du Droit de la Nat. et des Gens*, Liv. 1. ch. 16.

Public laws are not only, in this sense, those which regulate the political relations of the members of the society, but also all those which concern the support of order in the state.

Now, order pervades every thing which is of public interest; religion, manners, political and civil institutions, individual liberty, industry, agriculture, respect due to the laws, &c.; all these things come within its domain: *Neque tamen jus publicum, ad hoc tantum spectat ut addetur tanquam custos juri privato, ne quid violetur, atque ut cessent injuriæ, sed extenditur etiam ad religionem et arma et disciplinam et ornamenta et opes, denique, ad omnia circa bene esse civitatis.*¹

Thus, order may be compared to a net-work which embraces the entire society, and which must be woven and kept up by a skilful workman, if the latter do not desire that its meshes should be soon broken by private interests and passions, which are almost always at variance with the general interest.

In these last years, when all the foundations of society have been called in question, we have seen these principles attacked, and, in the name of unlimited liberty of conscience and of principle, a free manifestation demanded for worship as well as opinions, from which licentiousness only could result and has in fact resulted.

Now, in what touches religion, "if, in so far as it exists in the heart, it is an affair of conscience, in which every one ought to be guided by his own light,—in so far as it is external and publicly established, it is an affair of the state."²

Thus, in regard to this important object, the international law has admitted certain rules, which Martens sums up in these terms: "The right of the civil power, in what con-

¹ Bacon's Aphorisms, 9.

² Vattel; Droit des Gens, Liv. 1, chap. 12, parag. 127.

cerns religion in the state (*jus circa sacra*), includes: 1, the right to fix the degree of toleration which shall be accorded to different religions (*jus reformandi*); 2, the right of protection in regard to religions, the worship of which is declared to be lawful (*jus advocatiæ*); 3, the right of supreme inspection, or that of taking care to prevent, under the pretext of religion, the introduction of abuses contrary to the well-being of the state (*jus supremæ inspectionis*).

Each state having the right to determine for itself the degree of toleration which it will accord to forms of religion which differ from its own; foreign powers, which profess a different religion, have not a perfect right to demand for their subjects the liberty of religious worship, unless they have treaties upon which to rest their claim; but simple domestic devotion ought to be tacitly accorded to those who are allowed the liberty of residence.¹

The public law, therefore, encroaches upon the civil law; and, in reference to our subject, it will be the more difficult to draw the line of demarcation between them, for the reason, that as the line varies with the manners, institutions, and even the civilization, of different countries, it will be found to be different in each nation.

Is not the man of the east different from the man of the west? Has not the christian a different symbol from that of the jew, the mussulman, or the votary of Manou, though, among them all, we are able to recognise traces of the bible?

Now, this symbol has frequently presided in the formation of states, and on it political and civil institutions have been engrafted. Plutarch calls religion the cement of all society, and the support of the legislative power.

That which belongs to public order in the south will,

¹ Martens as above cited.

consequently, not touch it in the north ; and that which is law in a state of the east will be abandoned to individual will in the west.

It is true, that Pascal, drawing strange consequences from this fact, has said sarcastically : " One sees scarcely any thing just or unjust, which does not change its quality with a change of climate. Three degrees of elevation of the pole overthrow the whole jurisprudence ; a meridian decides upon truth. Pleasing justice, which is limited by a river or a mountain ! Truth on one side of the Pyrennees, and error on the other ! " ¹ This is disregarding the natural law, for truth is one, independent of the will of man.

That three degrees of latitude change the jurisprudence is a fact which we are willing to admit, provided, however, that the term jurisprudence be not taken as *divinarum atque humanorum rerum notitia, justī atque injustī scientia*. But, that three degrees should make truth a lie, is not true, and to say so is not merely an error ; it is to substitute the passions of men in the place of natural reason, and to give up the dominion of the earth to the mere weakness of humanity ; and, with such a doctrine, there is no injustice that may not be justified.

Pascal revives by his language the sophism which Cicero puts into the mouth of his interlocutor Philus ; and we shall answer Pascal as Cicero does Philus : *est quidem vera lex, recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna*.

There is, therefore, an immutable, eternal principle ; but, how, with the intimate transformations which have been given to it by the manners and institutions of men, can we arrest its movement and seize upon it, in order to determine, according to a uniform rule, what is and what is not public order ?

¹ *Pensées*, 1, § 8: See also D'Aguesseau, 7th *mercuriale*.

Without doubt, civilization, in its gradual progress, tends to mingle all these elements together, that they may afterwards produce the same fruits. Without doubt, the Stamboul of 1837 is no longer the city where a christian would not dare to land ; as the christian of the nineteenth century is no longer the crusader of the twelfth.

But, as we have already said, the chain of time cannot, and ought not to be broken, and we shall only trace here the dogmatics of legislation, without losing ourselves in a future which does not belong to us.

Thus, the only solid foundation which can be established on so many divers elements, is, that, in every country, whatever may be its manners or its institutions, every thing which touches it belongs to the public order ; and that all the laws made to secure the execution and harmony of the public order are political laws, which cannot be modified by private conventions made on the territory by any one, or in foreign countries by citizens ; in this sense, that the validity of such engagements will not be recognised by the mother country, if they are contrary to the rules of public order, and, that they may even incur its censure and reprobation. "When, therefore, we speak of the right of a state to bind its own native subjects every where, we speak only of its own claim and exercise of sovereignty over them, and not of its right to compel or require obedience to such laws on the part of other nations."¹

But, if the diversity of manners and of laws prevents us from laying down with precision the uniform rule for all civilized nations, it is only the more necessary to give life to it by applying it to the French legislation ; because, by seeing how France has understood and appropriated the principle, we shall find in this application an example of

¹ Story : Conflict of Laws, chap. 2, parag. 24. This important work is without contradiction the most remarkable writing on the subject since the commencement of the nineteenth century.

the modifications of which it is susceptible, and one of the ends of these inquiries.

Merlin¹ expresses himself as follows in regard to the effect of public laws :

“In the first line, are the laws relative to the capital points of public law, to the constitution, the organization, and the movement of the social body ; in the second place, all those laws relate to public order, which regulate the state of persons, that is to say, all those which have for their object to decide:—whether one is a denizen or a foreigner ; whether one is father, or whether one is a child, legitimate, illegitimate, or adopted ; whether one is a minor or of full age ; whether a minor is or is not emancipated ; whether a person of full age is or is not under an interdict ; whether he is placed under the inspection of a judicial counsel, or is perfectly free.”

“In fact, the public order is interested, that all the individuals of which the social body is composed should be classed, each in his political not less than in his civil rank ; that foreigners should not usurp the rights of denizens ; that the civilly dead should be distinguished from the citizen ; that the families which are its nursery should find, in the conditions and form of marriage, as well as in the rules concerning paternity and filiation, guarantees against every thing which leads to disorder ; and that no one by conducting himself, at his will, as of full age or as a minor, as emancipated, or not emancipated, as interdicted, or in the enjoyment of all his rights, may, from one day to another, change his relations towards those with whom he stands in relation.”

The doctrines developed by this learned magistrate are sanctioned by the civil code, which, in several of its articles, proves the introduction of the political element into the civil law.

¹ *Repertoire de Jurisprudence ; Loi, parag. 8.*

The most significant of these texts is article 6, which imports, that "no one can derogate by particular conventions from laws which concern the public order or good manners;" and we find an important corollary from this principle in article 900, which considers "impossible conditions, and conditions contrary to the laws or to good manners, as not being written." The combination of these two provisions demonstrates that article 6 is not restrained to conventions merely, but that it extends equally to all unilateral acts; for that which the will of two cannot effect, the will of one alone is much less competent to effect.

The principle established by article 6 is the nucleus of several other provisions of the civil code.

Thus, in order to maintain the enfranchisement of landed property, decreed by the constituent assembly, article 530 of the code prohibits the creation of rents not redeemable, and article 1901 of the same code prohibits irredeemable constituted annuities.

It is in view of the equality of rights, that, in the matter of succession, the civil code proclaims the equality of divisions (art. 745); the prohibition of substitutions (art. 896); and subsidiarily proscribes every convention having for its end to perpetuate indivision among heirs (art. 815); that it interdicts stipulations concerning a succession not yet open (art. 791 and 1130); and prohibits husband and wife from all conventions, the object of which is to change the legal order of successions (art. 1389). It is to guaranty the exercise of free discretion against weakness, cupidity, or immoderate affection, that the law does not permit one to renounce the faculty of devise, or the right of action in rescision on account of lesion before the accrual of such action (art. 1674); that it does not allow husband and wife the faculty of making donations to one another during the marriage; that it does not permit the wife or her heirs to renounce the community (art. 1653); or to break the

equilibrium between benefits and charges in this community to the profit or prejudice of one of the parties (art. 1521); that it prohibits one of the married parties from conferring a benefit on the other at the expense of a child born of a former marriage (art. 1098); or the conferring of a benefit on an illegitimate child at the expense of legitimate children (art. 908); and that it precludes those whose presence and attention in the last moments of existence may impose upon the will, from deriving any advantage from bequests or donations in their favor.

It is with the same view, as much as to maintain the marital power, that the law prohibits the wife from pleading in justice, from giving, alienating, hypothecating, acquiring, without the concurrence and authorization of her husband (art. 215, 277, 776, 907, 1449, 1538, and 1576, C. C.); and that article 1388 prohibits all derogation from the rights resulting from the marital power, over the person of the wife or children; or from the rights which belong to the husband as head; or from the rights conferred upon the surviving husband or wife, by the titles of the code concerning paternal power, minority, tutelage, and emancipation; or from the prohibitory provisions of the criminal law.

The cases which we have thus enumerated are far from being the only ones, in which the principles established by article 6 of the civil code are to be applied; for the public order is not always expressed in the form of prohibitive or imperative provisions. This appears still more particularly from the prohibition, contained in articles 1131, 1132 and 1133, to derogate from the laws which relate to good manners, since, if article 6 would seem to leave any thing to be desired, because, as Merlin observes with reason, "it is quite necessary that the laws which concern good manners should repress all immoral acts," the gap which results from the insufficiency of this proposition is filled by the

articles 1131, 1132, and 1133, which permit the annulling of conventions having a cause which is unlawful or contrary to good manners, and which restore in its fullest extent the law 7 de pactis : *Pacta quæ contras bonos mores fiunt, nullam vim indubitati juris est.*

Notwithstanding, however, the force of these texts, we have seen in our days a renewal of the controversy, which agitated the doctors of the sixteenth and seventeenth centuries and the beginning of the eighteenth, concerning the rules proper to determine the laws which cannot be derogated from. Dumoulin is of opinion, that they are to be recognized by certain signs : *Negativa proposito verbo potest, tolli potentiam juris et facti et inducit necessitatem præcisam desinans actum impossibilem.* Boullenois, who classes statutes into enunciative, dispositive, negative, and prohibitive, calls those which cannot be derogated from negative and prohibitive ; and president Bouhier places real statutes among the prohibitive ; but in view of the principles established in the civil code, it is evident, that it is necessary to disregard these subtleties, and to consider the object of the law rather than the expression employed by it, in order to decide to what order of law its provision belongs.

Thus, the maxim, that one may derogate from or renounce laws which are introduced only in favor of individuals, suffers an exception : 1, when the law itself prohibits a derogation from its provisions ; 2, when it can be inferred from its provisions or reasons, that it is absolutely prohibitive ; 3, when the provisions of the law have their foundation in some public or political cause or in the interest of third persons. To this we must add with Merlin, " that if the law has in view only private interests, without direct relation with the general interest, there is no doubt that particular conventions may derogate from its provisions. But, if, by its provisions themselves, or by its reasons (especially when they make a part of its text), it announces,

that, while it regulates private dispositions, it is determined by considerations of public interest, such conventions are invalid."

Nothing touches the public interest more nearly than the public order, of which Portalis says: "The support of public order in society is the supreme law; to protect conventions against this law would be to place individual wills above the general will; it would be to dissolve the state."

Nothing is more important to the public interest than good manners, of which the same author says: "As to conventions contrary to good manners, they are proscribed among all civilized nations. Good manners may supply the place of good laws. They are the true cement of the social edifice. Whatever offends good manners offends nature and the laws. If one could wound them by conventions, public honesty would soon be nothing more than an empty name, and all ideas of honor, of virtue, and of justice, would give place to feeble combinations of personal interest, and to the cupidity of vice."

After this view of the French legislation, it becomes more easy to define with precision, if not the limits which separate public from private law, at least those laws from which it is not permitted to derogate by the individual act of man.

Thus, a French citizen cannot withdraw himself from the explicit or tacit prohibitions contained in laws of the latter description, even by an act passed in a foreign country; and, on the other hand, a foreigner, at the same time that he preserves his personal state, is obliged to submit himself to these laws, whilst he resides on the French territory, and in regard to every thing relating to the goods which he may have there, for so long a time as he keeps the possession of such goods.

ART. VII.—TRIAL OF THE ASSASSINS OF FUALDES.

[The following translation of a celebrated criminal trial is made from that renowned French collection, entitled "*Causes Celebres*," and is the first case in what may be called the new series of that remarkable publication. The work from which this translation is made consists of four volumes in octavo, and is entitled "*Causes Criminelles Celebres du dix-neuvième siècle, redigées par une Société d'Avocats*," and was published in 1827. It is understood that a new edition of the old series, illustrated by engravings, has been recently republished in Paris.

The case of Fualdes has not been selected for translation because it possesses any superior interest to many others, which are found in the collection, or because of any supposed superiority in its style and manner of execution, but simply because it happened to be the first in the volumes. The humble task of translation was undertaken by the writer, that he might introduce the readers of the *Jurist* to an acquaintance with the most celebrated collection of trials, that is known to exist in the world, and with that style of reporting which the French have adopted, and which has given such deserved pre-eminence to this branch of their literature. This is not the place nor the time to enlarge upon its peculiarities and beauties; but a perusal of this imperfect translation will be sufficient, it is believed, to show that those who speak the English tongue have some reason for humiliation when they look upon this neglected department of their own literature.

The trial in the original occupies two hundred pages. It has been very much condensed in the translation; but enough is given, it is hoped, to convey some idea of the forms of proceeding in the French courts, in criminal cases, of the extraordinary pains, which are taken to obtain testimony, and the almost incredible patience of the judges in the investigation of truth. With regard to the manner in which the translation is executed, it is only necessary to remark, that the original has been followed as closely as possible, as the object of the writer was rather to show the French style of reporting, than to make up an interesting report from French materials.]

NOTWITHSTANDING the immutable principles of morality and the severity of the laws which are framed to enforce them, the most detestable vices and passions do so often afflict humanity, that it may well marvel at the crimes of which it is the source. Most men are but slightly affected by the news of an outrage; and, unfortunately, whatsoever may be the horror which they feel at first, the frequency of homicides, murders, and poisonings seems to diminish the interest

which every member of society ought to take in the repression of the crimes which desolate it. When a villain, drunk with fury, bathes himself in the blood of his enemy; when a wretch, who, by his own misconduct, has plunged himself in misery, or, tormented by an insatiable cupidity, has revenged himself, by the dagger, upon his industrious and prosperous neighbor, whose good fortune has excited his envy, or whose gold has tempted his avarice; when, urged on by the demon of jealousy, some madman has sacrificed to his suspicions the object of his love, or of his fears, for an instant, the public interest is excited; but the event of the day effaces that of the evening that preceded it; and the solemn proceedings of the trial often fail to recall it to memory; and when the punishment of the criminal has offered to an insensible public the frightful spectacle of the *denouement* of the horrible tragedy, they forget that justice has drawn her sword only to give reparation to outraged society, and to show, by a salutary example, the duties which it imposes upon its members. If, on the contrary, a crime is presented, the circumstances of which are so atrocious, that the mind recoils from considering them; if the accused hold such a station in the world, that their birth or education should have won for them high consideration; if, in fine, their criminality has been long a mystery; then opinions are debated, interest increases from day to day, public indignation calls for vengeance. Then truth throws her light over the obscurity—the secret of the enigma is discovered—and then society falls back into that dreamy sleep from which a terrible shock had awakened it, and some new excitement only will arouse it.

On looking for the cause of this lamentable indifference, would it be found in the selfishness (*égoïsme*), which renders so many citizens insensible to the general welfare; not perceiving, blind as they are, that the blow which falls upon an individual falls upon the community, and recoils

upon themselves? This is a grave subject of meditation, a problem rather needing solution than difficult to solve. The history of human crimes, and of the passions which have driven men to their commission, may conduce to this result. Among the facts, which may throw light upon this subject, the astonishing affair, which we are about to relate, should be placed in the first rank.

On the 20th of March, 1817, the city of Rodez perceived, with horror, that an unheard of crime had been committed within its walls. On the morning of that day a corpse had been discovered, floating upon the waters of the Aveyron. It was that of Mr. Fualdes, an old magistrate. A deep wound which he had upon his neck caused them at once to reject the idea of suicide, and did not permit them to doubt, that he had fallen under the blows of base assassins.

Surrounded by public consideration, respected by all, Mr. Fualdes could have had no enemies. His political principles, pronounced in favor of liberty, but wise and tolerant, ought to have disarmed the most ardent fanatics, and his fortune was apparently too inconsiderable to excite the cupidity of a murderer. What then was the motive, and who were the authors of the crime? The citizens of Rodez, dismayed, looked round them with affright. The most alarming rumors were circulated.

The investigations of the authorities were prosecuted with zeal and energy until the most certain indications of the origin of the crime had been discovered. It was ascertained that, on the 18th, Mr. Fualdes had received from Mr. Seguret, in notes and bills (*effets de commerce*) a considerable sum, as a part of the price of a domain which he had sold him; that on the afternoon of the 19th, a meeting for the negotiation of the bills, &c. had been agreed upon and fixed for eight o'clock in the evening. Accordingly, Mr. Fualdes left his house at that time, after having taken under his cloak something which he carried under his left

arm; and, half an hour afterwards, a person found, in the street Terral, the continuation of the street of Hebdomadiers, a cane, known afterwards to be that of Mr. Fualdes; and, not far from the house of Bancal, a handkerchief recently used, and twisted its whole length. These first discoveries, which appeared at first of little importance, led to the most conclusive results; and, at length it was ascertained, that a man had been stationed near the house of Mr. Fualdes, and that the moment he came forth, this individual had quitted his post and descended in great haste into the street de l'Ambergue, which was connected with that of Hebdomadiers, by a lane which crossed that of Saint Vincent. Other men were posted at the corner of the houses of Francis Vulat and Missonnier, in another street, and at the door of the house occupied by Bancal. The unfortunate Fualdes walked onward without a suspicion of danger: he had scarcely arrived at the house of Missonnier, when, at a signal given, several villains threw themselves upon him, placed a gag in his mouth, and dragged him violently into the house of Bancal, an infamous place, a den of debauchees and criminals. There, the unhappy old man was thrown upon a table, and the assassins prepared themselves for action. In vain he implored a moment to recommend himself to God. His request was denied with jeers. He struggles and the table is overturned, the assassins raise him again. One of them binds the feet of the unfortunate man, another, armed with a knife, undertakes to deal him the mortal blow, but his hand trembles; a third reproaches his accomplice with cowardice, and taking the knife in his own hand, plunges it into the throat of the victim. The flowing blood is caught in a bucket and afterwards given to feed a hog. After the consummation of this horrible sacrifice, the body of Fualdes is placed upon two cross bars enveloped in coarse woolens and covered with linen, bound up with cords like a roll of leather, and carried, about ten

o'clock in the evening, to the river Aveyron, by four individuals preceded by a tall man, armed with a musket, and followed by two others, one of whom only was similarly armed.

These discoveries, as yet incomplete, were obtained from disclosures made to third persons by the wife of Bancal, or escaped from the mouth of her young children. It had been known for a long time that the Bancals had always manifested sentiments of the most deadly hatred against Mr. Fualdes: the infamous business, which they did not blush to exercise, increased the suspicions, and gave new weight to the circumstance of the cane and handkerchief of Fualdes being found in the vicinity of their dwelling. Bancal, his wife and eldest daughter, were promptly arrested, and their other children placed in the almshouse of Rodez. A visit made to their house procured the discovery of the linen covering, of many bloody cords which had served to bind the corpse of Mr. Fualdes, and a vest which Bancal wore on the day of the assassination. The vest was sprinkled with blood, which he had endeavored to remove by scraping with a knife. The disclosures made by the woman Bancal and her daughter were perhaps sufficient to determine the place in which the crime had been committed, but not, with any certainty, the authors of it, or their number.

Public suspicion suddenly falls upon two persons, named Bastide and Jausion, the friends and relatives of Fualdes, belonging to families of the highest consideration in the country and admitted into the best society of Rodez. The first was a land-holder and planter, the other a broker, and the independence of their fortune would seem to have placed them above the slightest suspicion of a crime, which could have originated only in the most insatiable cupidity or the suggestions of mortal hatred. They were nevertheless constrained to come forward, when in support of the first facts

which tended to criminate them, new grounds of conviction were discovered.

On the morning of the assassination, at about half past seven o'clock, Jausion had introduced himself into the mansion of Fualdes. The frightful news was then publicly known. Instead of bearing to the widow those consolations which might have alleviated the misfortune which had fallen upon her, Jausion ascended into the apartments, searched them, and penetrating into the cabinet of Fualdes, and breaking open a bureau with a hatchet, took from it a bag of silver, a day-book in which Fualdes entered all his transactions, a large morocco port-folio fastened by a clasp, and several bills and notes which Mr. Fualdes had received in the evening from Mr. de Seguret. He carefully abstained from speaking to the widow on the subject, and said to a domestic, who saw the bag of silver in his hands, "I take this bag in order to seal it; say nothing to any person on the subject." On the same day at ten o'clock, Bastide Grammont knocked rudely at the door and demanded, with an earnest air, if Fualdes was there. (Nobody was then ignorant of his death.) "What do you say?" answered the girl, whom he addressed. Bastide, putting his hand to his head, said, "Ah! I had forgotten! It is necessary to go and secure every thing." He then ascended rapidly into the chamber of the master of the house, without asking to be accompanied,—the girl followed: he ran to the chest of drawers in which Fualdes kept certain papers, thrust in his hand, locked it and took the key: he also closed the chamber; but at this moment a servant presented herself to remove the clothes from the bed, and Bastide re-entered the chamber: he placed himself by the side of the bed, and something fell at his feet, which he picked up with manifest astonishment. "We will put this key, said he, with the others." This was the key of Mr. Fualdes's bureau, and which he always carried about his person. All these

facts were fully proved by the depositions of numerous witnesses. Jausion had been seen in the house of Fualdes on the 20th of March, with his wife, the sister of Bastide and the lady Galtier. The presence of Bastide in Rodez on the 19th was demonstrated in the most incontestable manner.

Jausion and Bastide were arrested and with them, Bach, Colard, Missonnier, Bousquier, the girl Anne Benoit who lived in the house of Bancal, and whose numerous declarations caused her to be regarded as accomplice in the crime.

Every day seemed to throw new light upon the circumstances of this assassination; but all the evidence obtained would have been insufficient to dissipate the doubts which yet remained, when an unexpected event threw a new light upon the affair.

It had been reported abroad that a certain lady, belonging to one of the most considerable families in the department of Aveyron, induced by a motive which every one explained in his own way, found herself in the house of Bancal on the day and hour of the assassination, and was a witness of the deed. Every thing which was thus rumored seemed very mysterious and romantic. Many women were named, whose education and rank in society interdicted them, on penalty of dishonor, from entering the den of Bancal and his family; but justice could find no probability in these often contradictory reports, and it was supposed they had been invented from sheer idleness or love of the marvellous, and these uncertainties were removed in the following manner.

An officer, named Clemandot, residing temporarily at Rodez, was dining one day with some gentlemen. The conversation turned upon the assassination of Fualdes, and one of them repeated the report respecting the lady who was supposed to have been present and mentioned the name of a young lady of the city. Mr. Clemandot, constrained

by a sentiment of justice, said boldly, "That is false, I know who it was." The same day he was called before the judge of examination, and placed in his hands a declaration, from which it appeared that on the 28th of July, 1817, when walking with the lady Manson, he remarked to her that a rumor was current in the city, that on the evening of the assassination a dame or young lady found herself in the house of Bancal, where it was supposed the crime had been committed: that she remained there, in spite of herself, during all the time of this horrible execution; that she had gone there in compliance with an appointment, and that *she* had been named, among many others, as the person. The lady Manson, added Mr. Clemandot, did not, as I thought, repel this accusation with sufficient warmth! He believed her to be confounded, and pressing her with questions, madam Manson at length confessed that it was she who was there. It would be difficult to describe the emotions which agitated Mr. Clemandot, when he heard this confession. He questioned her anew, and conjured her to conceal nothing from him, assuring her that he took the deepest interest in her position, when he considered the danger which she had incurred. She then said, that having entered the house of Bancal, while speaking with the woman Bancal, she heard, without, a noise occasioned by many persons, who seemed to dispute the entrance; the woman Bancal then thrust her into a contiguous closet, where she fastened her; that the rapidity with which this movement was executed threw her into the greatest fright; that this affright was redoubled when it was no longer possible to doubt that they came to commit a dreadful crime; and the more still, when she perceived that her own life was menaced; that she was at last drawn from the closet, and conducted back to it after having promised the utmost secrecy concerning all she had seen and heard, they telling her that she would pay with her

life the least indiscretion. She added that it was a long time before she recovered from her affright.

Mr. Clemandot said to madam Manson, that since she was in the house of Bancal, she ought to know who were the assassins. "Do you," added he, "know Bastide Grammont?" She answered him that never having seen him but once, she could not recognise him. "And Jausion?"—"Ah," said she, I have seen him but two or three times and can with difficulty distinguish him from his brother." Mr. Clemandot remarked, that living in the place, it was surprising that she was not better acquainted with the inhabitants; to which she replied that she had been a long time absent.

Mr. Clemandot closed his declaration in these terms: "There is a mass of smaller details which have escaped my memory. That which I can declare with truth is, that the feebleness of the reasons of madam Manson, and the embarrassment which my urgent questions respecting these two persons (Bastide and Jausion) created, convinced me that she knew all the actors in this bloody drama. My conviction was strengthened, when I said, "Madam, all you have told me has gone to show that one of the principal criminals is a man who was only considered guilty of a theft the morning after the assassination.—Who is that?" said she. Jausion, I answered. She instantly covered her face with her hands, and said, "Let us talk no more of this." I regarded this as a tacit admission. I continued to converse upon this subject, and having remarked that it was generally reported in the city that Bastide and Jausion were not the sole contrivers of the assassination, she answered that there were, in fact, two others who performed a part in it, and who were not yet arrested, but she did not know who they were. I demanded why she did not give information to the magistrates. "These people," said she, are connected with so many families! Sooner or later, I shall

pay dearly for my imprudence; the visits, also, which I received from madam Pons and madam Bastide, have restrained me." The first of these was the sister-in-law of the two principal accused, the other, the wife of Bastide.

These disclosures were of the highest importance, and created an eager desire to obtain proof that they were founded in truth. Madam Manson was the daughter of an esteemed magistrate, the wife of an old officer; the name of her family, more perhaps than the qualities which she had received from nature, had thrown open to her the best society in Rodez; but to an extreme levity of conduct she joined a romantic spirit, and a decided taste for extraordinary adventures; and if any one thought moreover that she had been a voluntary witness of the assassination of Mr. Fualdes, the cause of her being in the house of Bancal left a wide field for the imagination. The magistrate had scarcely received the declarations of Mr. Clemandot, when madam Manson was called before the tribunal. The efforts made to obtain from her a confirmation of the facts alleged by this officer were all in vain. (Here follows a long report from the prefect of his repeated interviews with madam Manson, and the means he employed to induce her to make a full disclosure. She denied, at one time, that she had any conversation with Mr. Clemandot on the subject, and that she was at the house of Bancal. At another time she admitted that she was there—but she knew no one and saw nothing, and that she had fabricated this story for mere amusement. It was the universal belief, however, that she was there, that she saw every thing that occurred, and could point out the assassins. Among other means resorted to, to elicit the truth, she was carried to the house of Bancal in company with the prefect and others. On reaching the room in which the murder was supposed to have been committed, she turned pale, trembled violently and fainted. On recovering she exclaimed, "Let us go. Take me away,

I shall die if I stay here." Some accidental words which escaped her served to strengthen the general belief of her knowledge of the facts. At length, on the 2d of August, 1817, she made the following written disclosure before the prefect.

"On the evening of the 19th of March, 1817, I was passing along Hebdomadiers street. Being near the house of Mr. Vainettes, I heard many persons approaching; in order to avoid them I entered a house, the door of which was open, and which I have since learned was that of Bancal. As I was passing along the passage, I was seized by a man who came either from without or from the interior of the house; the agitation into which I was thrown did not permit me to distinguish him. He carried me rapidly into a closet. "Be silent," exclaimed a voice. The door was then fastened, and I remained like one in a swoon. I know not how long I staid in the closet; I heard from time to time speaking and walking in the adjoining room, but without being able to distinguish what was said. A silence of a quarter of an hour succeeded to the noise which I had heard. I then attempted to open the door or a window, the lock of which I found in my hand, and gave myself a violent blow upon my head.

"A man immediately entered the closet, seized me strongly by the arm, caused me to cross a hall where I thought I caught a glimpse of a feeble light, and we went out into the street. The man drew me rapidly along to the city square, to the side of a well; he stopped and said in a low voice, do you know me? No. I answered without daring to raise my eyes. I confess that I did not try to discover him.—Do you know where you are?—No.—Have you heard any thing?—No.—If you speak—you die! And shaking me violently by the arm, 'Go then,' said he, and pushed me from him. I went a few steps without daring to turn round. After recovering a little from the

excessive fright into which I had fallen, I went to knock at the door of Victoire, an old female servant of my mother. She did not hear me. I then went down the street, and attempted to conceal myself under the stair-case of the church of the Annunciation, which I knew to be deserted. I perceived that a man followed me, and I recognised him for the same who had before conducted me. He approached and said: 'Is it true that you do not know me?—No.—I know you very well.—That is possible; many persons may know me by sight, whom I do not know.—We have both escaped very luckily. I entered this house to see a girl. I am not of the number of assassins: at the moment when I seized you, seeing that you were a woman, I took pity on you and placed you out of the reach of danger: but what carried you to that house?—I went to meet one whom I thought I knew, and wished to assure myself.—Are you sure that you do not know me? If you utter a syllable concerning this affair . . . Swear that you will never speak of me. In that place it was not so dark as here: could you recollect me, if you should see me in the day time?' I answered—No. He left me in about half an hour, saying; do not return until day, and do not follow me. I assured him that I had no wish. At break of day I regained my residence and retired to bed. They knew not that I had passed the night without. A few hours after the news of the assassination burst upon the city, and I had suffered so much from terror that for a long time I made a little girl sleep in my chamber."

Signed

E. MANSON."

I place here, continues the prefect, a remarkable comparison in regard to which madam Manson enjoined secrecy and of which she has made no mention in her written declaration. She had told Mr. Clemandot that she was dressed as a man when she was at Bancal's. She conversed with me respecting this circumstance when she saw that I

was informed of it. I demanded what was her costume. "A vest, said she, which I have yet: in regard to the pantaloons, it is useless to look for them" This concealment awakened my attention. "What have you done with the pantaloons?" I demanded.—I have burned them. Why?—She remained silent. I reiterated my question; and seeing that she was troubled, I added, looking fixedly upon her, "You have burned the pantaloons, because they were stained with blood." She answered, "That is true: at the moment I perceived myself seized and transported into the closet, I cried out, I am a woman! and it was then that he answered me, Be silent . . . In thrusting me into the cabriolet, I struck, I think, against the latch of a window, and caused a bleeding at the nose, to which I am subject. My pantaloons were all bloody. I perceived this afterwards, and when I was at the church I put on my female apparel. I did this the more easily, because I had worn my robe under my male clothing.

"Madam Manson left me with the impression, I confess, that she had told the truth, but not the whole truth, and that she knew the murderers, at the very least her preserver. I thought she had been restrained at the time by fear and by a knowledge of the individual."

Not only madam Mason had not told the whole truth, but adopting a system of variations, which can scarcely be conceived, she soon declared that her deposition, given on the second of August, was false!

[An accomplice, named Bousquier, soon after made a full confession, in which he implicated Bastide, Jausion, and all the other persons accused. In the meantime it had been discovered that Bastide and Jausion were largely indebted to Mr. Fualdes, and an adequate motive was therefore supplied to induce them to commit the murder. The man Bancal poisoned himself in prison. Madam Manson still contrived "her system of varieties"—so that there was no

one declaration or assertion that she had made at one time, which she had not retracted at another. The accused, in the meantime, preserved the most guarded silence. On the nineteenth of August, 1817, Bastide, Jausion, Bach, Colard, Bousquier, Missonnier, the woman Bancal and her daughter, and Anne Benoit, were put upon trial before the court of assizes at Rodez, on the charge of assassination, and drowning the corpse, and Jausion, Bastide and others on the charge of robbing the house of Fualdes the morning after the murder. The accused appear to have been all tried at the same time and on all the charges.]

The indignation manifested by the citizens of Rodez against the accused had excited in the great concourse of spectators, which filled the hall of the tribunal, a susceptibility, which manifested itself on every occasion; thus Mr. Fualdes, the son of the victim, who, in a trembling voice, called upon justice to avenge the manes of his father, excited by turns, by his grief and his calmness, tears and admiration; the hypocritical responses of Jausion, the brazen assurance of Bastide, the cold indifference of the woman Bancal, redoubled the horror which they inspired. At their side Colard and his mistress Anne Benoit, only remembered that they were on the criminal seats to defend each other, and to exhibit all the solicitude of exalted love, which had nevertheless had its birth in the most shameful intimacy. At last in these dramatic scenes appeared madam Manson, subduing the strong impressions which her conduct had created, conducting the mind from one emotion to another, and sustaining the interest which the multiplicity of details must sensibly diminish, or at all events abate.

The number of witnesses for the prosecution amounted to *two hundred and forty-three*! Seventy-seven had been summoned for the defence at the request of the accused. When madam Manson was called to give evidence a profound silence reigned throughout the hall, and the president

addressed her in the most affecting manner. "Madam," said he, "the public are convinced that you were carried into the house of Bancal by accident and in spite of yourself. They regard you as an angel destined by Providence to clear up this horrible mystery. Even though some folly were exhibited by you, the declaration which you went on to make, the immense service which you proceeded to render to society, effaced the recollection of it." Then addressing the woman Bancal: "Do you know this lady?" Madam Mason turned quickly towards Bancal, lifted her veil, and in a firm tone: "Do you know me?" *Ans.* No.

The President to madam Manson. Do you know this woman? *Mad. Manson.* No, I never saw her.

The President to Bastide and Jausion. Do you know this lady? *Jausion.* I only recollect of having seen her two or three times, in four or five months, making a visit to Madam Pons, my sister-in-law.

Madam Manson (briskly). Why then has he the audacity to salute me in full tribunal.

Bastide. I only knew the lady by having met her once in the street.

The president exhorted madam Manson anew to tell the truth. She threw an expressive glance upon the prisoners and fell down in a swoon. She was instantly carried out upon the terrace attached to the hall; and having come to herself, after very strong convulsions, she repeatedly cried out with the accents of the strongest terror, "Remove those assassins out of my sight! remove those assassins out of my sight!"

Madam Manson, being in a condition to reappear, is replaced upon the seat of the witnesses. The president addressed her kindly: Come, madam, endeavor to calm your agitation: do not be afraid, you are in the sanctuary of justice, in the presence of magistrates who will protect you. Courage! Let us know the truth. What have you

to tell us? Were you not present at the assassination of Fualdes?

Mad. Manson. I have never been at the woman Bancal's. (After a moment's silence) I think Bastide and Jausion were there.

President. If you were not present why do you think so?

Ans. From the anonymous letters which I have received, and from the proceedings which they afterwards pursued in regard to me. (She then explained that after her declaration on the second of August, before the prefect, madam Pons, the sister of Bastide, came to see her, and she had promised that lady to retract her declaration, because it was false.)

President. You tell us your first declaration is false: Do you know nothing then in regard to Jausion and Bastide? Why did you say you considered them guilty?

Ans. It was mere conjecture. (Madam Manson turns to Jausion.) One who has killed his child, may well kill his friend.

Jausion cast his eyes upon madam Manson: the latter continued in a firm tone; sir, I saw you.

President. How did he destroy his child. *Ans.* That affair was hushed up, but the public was not duped.

President. Have you no other ground for your conjecture than that the affair was hushed up? *Ans.* I have not been at the woman Bancal's: no, I have not: I will maintain this at the foot of the scaffold. (With an elevated voice.)

The president reminded madam Manson that she had held other language to irreproachable witnesses, and among others to Mr. Rodat, her cousin.

Madam Manson (deeply affected). I ratify in advance all that Mr. Rodat shall say; he is incapable of falsehood.... I have been before the prefect many times; I have made

unfounded declarations: they are false: I have retracted them. I promised this to madam Pons: the disclosures I made were drawn from me by fear of my father. If you knew with what I had been threatened!...

President. It is in the name of your unhappy father, distracted by a thousand griefs; it is in the name of justice, in the name of humanity, which groans over this horrible crime; in the name of nature, whose ties have been broken by a crime which alarms universal society, that I conjure you to tell us all you know. Why restrain the truth? Yes, if you have committed some indiscretion wherewith to reproach yourself, this moment will enable you to establish yourself in public opinion. See with what attention they hear you. Speak, speak then, I conjure you in the name of God, justify yourself. The public, alarmed by a crime committed upon the person of a man, whom you knew, of a magistrate who sat by the side of your father, demands nothing but the triumph of truth. It will love you, it will raise you to the skies if you will make the criminals known. Shew us that you have been educated in the love of justice: make us see that you love it and know how to obey it. Remember that you have often spoken of the honor of your family; that this honor cannot be allied with perjury, and the wounds it may receive cannot be soon healed. Speak, daughter of Enjalran! speak, child of a magistrate....

During this discourse the figure of madam Manson gradually changed; at the last words she fell into another swoon. On coming to herself she perceived at her side general Desperriers; and repulsing him with one hand, and laying the other upon the general's sword, she cried out, "You have a knife," and again fainted. Having soon recovered, she said to the president: Ask Jausion if he did not save the life of a woman at Bancal's.

Jausion. I do not know of having saved any body's

life: I have done many services, and have done them with pleasure, but I have no idea The eyes of the accused then encountered those of madam Manson; the latter turned away her own, and cried, with force, 'There was a woman at Bancal's—she was not saved by Bastide

President. By whom? Were Jausion and Bastide there?

Madam Manson. I tell you there was a woman at Bancal's. Bastide wished to slay her, and Jausion saved her.

President. But Bastide and Jausion deny that they were at Bancal's.

Madam Manson. Bastide and Jausion not at Bancal's! ask Bousquier if he knows me. The president repeated the question.

Bousquier. No. I do not know her; I think I never saw her.

President. And you, madam, do you know Bousquier?

Ans. No, I see him now for the first time.

President. Jausion and Bastide, you were at Bancal's. Which of you wished to save *Madam Manson* (in a loud voice). Not Bastide—not Bastide. *President.* If you were not at Bancal's, how do you know a woman was saved? Who told you? *Ans.* Every body. Blanch des Bouvires. *President.* Do you know the woman, who was saved at Bancal's?

Answer. I wish to heaven, I knew her. The moment is not perhaps far distant when this woman will shew herself. It was Mr. Blanch des Bouvires who told me there was a woman at Bancal's, whose life Jausion had saved; they spoke of E and de M . . . (Enjalran—Manson). Those are my names. Madam Manson again fainted, and recovering spoke in a low tone to the general at her side.

President. Where was this woman concealed? In a closet?

Madam Manson (in a broken voice and with tears). Yes, they say she was concealed in a closet. *President.* This

woman was not ill in the closet. *Ans.* It was not I who was at Bancal's; I know not whether this woman was taken ill in the closet; but I know that Bastide wished to kill her, and that Jausion preserved her and conducted her to the well in the city square. -

President. In passing through Bancal's kitchen, did this woman see a corpse? *Ans.* I repeat that I was not at Bancal's. *Pres.* How can you know so many things, if you were not there? *Ans.* These are conjectures, which I have formed from the letters I have received, and the proceedings which the accused have taken in regard to me. I was told after I had made my first declaration, that Jausion had called for *daggers*; but when madam Pons came to see me, she assured me that it was untrue and that Jausion was tranquil. I received many invitations to visit them at their houses, but I did not go for fear of meeting some of the Bastide family.

After these words, madam Manson, with an embarrassed manner and in a low voice, having uttered the word *oath*, the president demanded if they did not exact an oath from the woman saved by Jausion. At this question, she endeavored to recover all her self-possession, and throwing an indignant and angry glance upon the accused, she answered: they say, they made her take a terrible oath upon the dead body; ask Jausion if he did not think the woman whose life he saved was madam Manson. Jausion denied having saved any person's life.

The president required general Desperrieres to be examined. He declared that immediately after the assistance he had rendered madam Manson when she fainted, she said, in presence of many others, save me from these assassins! that having made every effort to reassure her, she had answered, "you will not always be near me, general; if they escape, they will murder all the honest people in the

department. As soon as they call me, I will tell the whole truth."

The president again addressed madam Manson. Tell the truth then, madam. We wait for you with impatience. *Mad. Manson.* I wish to know why the accused have taken such steps in regard to me, if they are not guilty.

Mr. Fualdes, the son, suggested that madam Manson was frightened by the presence of the prisoners, and requested that a number of persons might be placed between her and them, and that she might be surrounded by an armed guard, in order that her personal safety might be secured, and that she might not have a view of the prisoners. It was accordingly done.

The President to Bastide. You see, Bastide, that you were in the house of Bancal, at the moment of the assassination. It was you who proposed . . . *Bastide* (interrupting). I have already had the honor to inform you that I never had any connection with Bancal's house, although madam Manson says so. The latter immediately sprang up, and striking her foot violently upon the floor, cried out in a tone of indignation: confess, wretch! At these words, a movement of horror seizes the whole assembly, a mournful silence reigns through the hall, and the prisoners themselves seem to be struck with consternation.

President. How can you accuse the prisoners so strongly, and yet deny that you were at Bancal's? *Ans.* How can they contest it, when there are so many witnesses.

Bastide, being interrogated, insists upon his innocence, and the president entreats madam Manson to tell the whole truth.—I cannot—was her reply.—But why do you shudder when you hear the voice of Bastide? Why are you so agitated when the dead body of Fualdes and the knife are mentioned? *Ans.* I cannot say, that I was at Bancal's, and yet it is all true . . . call the witnesses with whom I have conversed. I will deny nothing. I agree in advance to all that Mr. Rodat shall depose.

At this instant Mr. Amans Rodat is introduced. This witness testified that madam Manson had spoken to him several times respecting the assassination of Fualdes, without ever saying a word favorable to the innocence of the accused; but she had never said positively that she was certain of their guilt. One day she said, if you knew the whole truth in regard to the assassins of Fualdes, what would you do? if you were at Bancal's? if you had seen the whole? The witness repeated the answers which he made her. She then addressed to him new questions, and among others, these: But when one has been bound by an oath? But what would you do if one of the criminals had preserved your life? Could you bring the axe upon one, who had saved your life? To which the witness answered: Placed between perjury on the one hand and the sacrifice of a sentiment which is rooted in every generous heart, I should inform the court, in the presence of the prisoners: One of these men has saved my life; I think I ought not to be compelled to disclose his name; the court will judge whether I ought to speak.

Many witnesses are successively examined, who depose to declarations of madam Manson. Clemandot and d'Estourmel repeat their former testimony. The deposition of Clemandot occasioned a new scene between madam Manson and the accused. Jausion exclaims: Mr. Clemandot has made madam Manson tell more than she wished. I demand, moreover, that this lady tell the whole truth. I ask nothing more.

Bastide rose, in his turn, and implored madam Manson to tell the truth. From his gestures and the warmth of his entreaties, he seemed to have no fear but of falsehood. "Do you fear my family?" said he; "if I am guilty, they will erase me from its members." Fualdes, the son, also exhorted her to tell all she knew.

Madam Manson, (who had remained until then in an

attitude of meditation) I was not at Bancal's . . . I will say no more . . . Let them conduct me to the scaffold . . . I am a woman of honor . . . I speak the truth here . . . I have said nothing to Clemandot, I declare this upon my oath.

Bastide. What do you fear, madam? My family will make an agreement . . . *Madam Manson* (with vivacity), I have no agreement to make with you, Bastide!

After hearing the testimony of Mr. Julien, who confirmed the facts stated by d'Estourmel, madam Manson is again interrogated. She declared that she was not at Bancal's, that every thing induced her to believe that a woman assumed her name, and that all she had ever told Rodat and Clemandot was simply to say, yes.

The president attempted to encourage madam Manson. Has not some one informed you, that if you made the same declaration before the court that you did before the prefect, you would destroy Jausion?—*Ans.* Yes.—Was it done by his order?—No.—But who told you?—*Ans.* I will never tell.

A new exhortation by the president. Descend, said he, into the recesses of your conscience. *Ans.* What do you wish me to say, when my disclosures may criminate myself? I have told the truth when I declared I was not at Bancal's, I did not see the crime committed. *Ques.* But have you not seen the woman who was there?—*Ans.* No.—*Ques.* How then came you to say yesterday that Jausion and Bastide were guilty? *Ans.* I do not know whether Jausion was an accomplice in the assassination of Fualdes.

In spite of all entreaties and efforts, madam Manson persisted in denying that she was at Bancal's, and was a witness of the assassination; she declared that every thing she had said elsewhere was false, and that before the court she told the truth because she was free. During the whole trial at Rodez she persisted in the system which she had adopted, and the attorney general found himself under the

necessity of taking against her the usual proceedings against a false witness.

It is easy to conceive the interest which the magistrates felt to induce madam Manson to pursue a course more conformable to her duties and the requirements of honor and justice, when it is considered, that beyond the *probability* of the guilt of the accused, which had been created by the strongest evidence, there existed but two witnesses of the crime, in whose testimony but a very limited confidence could be placed; for what credit could be given to the indiscreet disclosures of a child of eight years, which might consign the head of her mother to the block; or the tardy confessions of an accomplice, whom perhaps the hope of saving his own life had induced to accuse innocent persons at the same time he accused himself. This trick was not unknown in judicial records, and justice ought to receive such revelations with extreme caution.

Thus the concealments, the suicidal denials of madam Manson, sometimes accusing, sometimes pretending that she knew nothing, embarrassed in the highest degree the consciences of the jury. In an institution where the law demands from those who are called upon to decide, only the expression of their conviction; where it tells them, you shall not decide upon the testimony of such and such witnesses, but only from the conviction you shall have of the guilt of the accused; madam Manson only threw difficulty and obscurity, instead of light, by making a sincere and positive confession of a culpable indiscretion, if her first declarations were false; or in not designating with sufficient certainty the guilty, if the crime were committed before her eyes.

The advocates of the accused did not fail to take advantage of her contradictions. Mr. Romiguières, the counsel of Bastide, with that talent which distinguished him, showed how little credit they deserved; and apostrophising her

with the utmost energy, he launched at her this severe invective.

"Your contradictions, your concealments, your half-confessions, your frights and swoons, have furnished the public minister with arguments, from which he will draw conclusions more fatal to the accused, than if you had sworn in the most positive manner against them. Better, that the truth, terrible as it might be, should all have come from your mouth. What has restrained you from testifying fully? I call upon you in the name of the prisoners. What have you to fear from their vengeance? They are in irons"

Madam Manson instantly cried out: Ah! all the criminals are not in irons.—Name them, exclaimed Romiguerès. It was believed, for a moment, that, abandoning her system of mystery, madam Manson was about to fix the opinions yet wavering upon the basis of certainty. Vain hope. She answered, the truth shall never escape my lips.

After very long arguments, on the twelfth of September, 1817, Bastide, Jausion, Bach, Colard and the widow Bancal, were found guilty by the jury and sentenced to undergo the punishment of death; Anne Benoit and Missonnier to hard labor for life, and to be branded with the letters T. P., and Bousquier to imprisonment for one year.

On the 9th of October following, the decree of the court of assizes at Rodez was quashed for informality (*vice des formes*) and a new trial took place before the court at Albi the 25th of March, 1818. In the meantime, additional evidence of the highest importance was obtained—from witnesses, whose pusillanimity had before prevented them from testifying—from accomplices, who, abandoning that system of denial, which had been attended with such ill success, narrated all the circumstances, the slightest details of the assassination, and the transportation of the body to the river.

Madam Manson, though accused of having given false testimony, was imprisoned as an accomplice in the assassination, and still persisted in the same system of mystery. She was about thirty-two years of age, small, pale, with expressive eyes, of moderate height, and the vivacity of her spirit rendered her sometimes pretty, but she was always amiable and interesting. The hope was still entertained that she would abandon her deplorable system, and by a frank and full disclosure, contribute to the triumph of truth.

The time was fixed for the 25th of March, 1818, and at half past eleven o'clock the court entered. It was composed of Messrs. de Faydel, president; baron de Cambon, viscount de Combette, Caumont, Pagan and Pinau, judges; baron Gary, attorney-general of the king, Colombars, advocate-general and Combyaires, attorney of the king at Albi, and twelve jurors of high rank and respectability.

The indictment (*l'acte d'accusation*) against madam Manson was as follows:

"The trial at Albi gave rise to incidents as extraordinary perhaps as the outrage which was the subject of the trial. A woman, named Manson, after having declared before the prefect of Aveyron that she was an eye witness of the assassination of Fualdes; that she was in the house of Bancal at the moment he was killed, that she herself ran the greatest danger; after having made the statements to many other persons, appeared at the trial and denied all the facts, and swore that she was not at Bancal's; her oral assertions were contradicted by her countenance, her looks and her actions. The sight of the accused produced in her convulsions and faintings, either real or feigned. Several times during the hearing, she fell or seemed to fall into a swoon. The words, *daggers*, *assassins*, escaped her lips, and her apostrophes to Jausion and Bastide testified her perfect knowledge of the details of the assassination. The

progress of the trial afforded only a constant spectacle of variations, contradictions, and contempt, express and avowed, of the oath she had taken to tell the truth ; and she had the audacity to declare, towards the close of the proceedings, that the truth should not come from her mouth. All the circumstances shewed that she was initiated in the mysteries of the crime which had been committed upon the person of the unhappy Fualdes, or at least in its consummation. A deep interest could alone give occasion for her variations, contradictions, recantations, and her formal refusal at last to tell the truth. In the proceedings, and in her letters to the prefect, she spoke of the tragic end which appeared to be in reserve for her. The position of her son, deprived of his mother, appeared to occupy much of her thoughts ; and, in short, every thing concurred to prove that she feared the punishment due to criminals. The lady Manson, is therefore accused of having aided and assisted the authors of the murder of Fualdes in the preparation for or execution of the deed, or in its final consummation."

The president addressed the jury and recounted with great particularity all the circumstances of the assassination, derived in part from the examination of the witnesses and in part from the suggestions of his fancy. The attorney-general then opened the case on the part of the accusation, and was followed by Mr. Trajan, the counsel of Fualdes, the son, praying that he might be admitted a civil party to the proceedings in his own interest and for the creditors of his father. This being granted, he addressed the court with extreme emotion, in a short speech.

The court then proceeded to hear the witnesses ; two hundred and forty-five having been summoned for the prosecution and about sixty for the defence. When the witnesses had retired to the rooms designated for the purpose, the court proceeded to hear one Lacombe, who testi-

fied to a sharp controversy between Fualdes and Bastide on the 19th of March, 1817, on the former's demanding payment of the money which the latter owed him. Several of the first days of the trial were occupied in hearing the proof that Jausion and Bastide were in Rodez at the time, and that they were under large pecuniary liabilities to Fualdes.

In the course of the trial, while madam Manson was under examination, the president stated that the most extraordinary efforts had been made to corrupt and intimidate the witness. She had received two anonymous letters threatening her and her son with death, if she gave evidence against the prisoners. After reading these letters aloud, he endeavored to encourage madam Manson—assuring her of safety and protection and conjuring her, in the name of God, to testify the whole truth. She admitted that she was at the house—that she was dressed in male clothing, that her own life was threatened by Bastide, and that she was saved *by a man*—whose name she constantly refused to utter. She declared that she took no oath. The widow Bancal being interrogated immediately afterwards declared that madam Manson was not there at the time. Bach, in his confession, stated that three women were present, but their backs were turned to him and he could not recognise either of them. On the 19th day of the trial, young Fualdes requested that Jausion might be ordered personally to inquire of madam Manson whether she saw him at Bancal's. Jausion was scarcely able to conceal his agitation; he hesitated for a moment, and then turning towards madam Manson, said, with a smile of remarkable affectation, madam, I am ordered to speak to you. Madam Manson turned away, and permitting her head to drop upon her hands, remained a few moments without speaking, and then said; I have nothing to say. The young Fualdes requested the jurors to remark the embarrassment of the two speakers.

The President. Speak, madam: you owe the truth to justice. Did you see Jausion at Bancal's? Was he the person who led you out of the closet, and conducted you to the city square? Explain yourself without fear—justice protects you.

Madam Manson, (after some minutes silence and with great agitation.) I cannot recollect (*reconnaître*) Jausion.

A witness, named Theron, being introduced, testified as follows:

On the 19th of March, I returned from the Aveyron, where I had been to fix some hooks for fishing. When I arrived near the edge of the meadow, I heard many persons descending the same road I had travelled. I thought they were people from Laguiroule and stopped. The people, as they approached, exhibiting a frightful object, I concealed myself behind a thicket, and saw a train pass, preceded by Bastide, whom I perfectly recollect, and who carried a musket, with the muzzle downwards. He was followed by four men who carried, upon two bars, a corpse enveloped in a covering. Among these four men I recognised a soldier named Colard, and Bancal, who were both before; behind I recognised Bach, who carried one of the bars; but I did not recognise the person who occupied the last place. At the side of Bach and the unknown, who carried the corpse, and a little behind I saw another individual whom I was not able to recognise; and at last a step or more behind these three last persons, I positively recognised Jausion, who carried, as well as Bastide, a musket, with the muzzle pointing to the ground. I knew him because I had seen him very often, although at the time I speak of, he had under his round hat a kind of whitish handkerchief, which fell down upon his eyes. From the place where I lay hid, I followed the train with my eyes, as it passed over the windings of the field. When it had arrived in the middle, the persons who com-

posed it stopped to breathe; I immediately took my shoes in my hand and fled.

This witness explained his suppression of this important testimony, until after the trial at Rodez, by saying that as Bastide had been once released, he feared he might be again, and that he would treat him as he had Fualdes.—Bach admitted that the train was composed as the witness had stated. *Colard*. Inquire, Mr. President, of this witness if he recognised me. *Theron*. Yes, sir, perfectly. *Colard*. This is not true. I had no hand in this crime. My soul and my hands are pure. Notwithstanding the solemnity of the occasion, the audience were not able to restrain their mirth, and some loud laughs interrupted Colard in the exordium of his discourse.

Colard (turning to the spectators). Gentlemen, if you were in my place, you would not laugh; and you, witness, will render an account of your testimony before God.

Anne Benoit (the mistress of Colard, rising with vivacity, and speaking to Theron). My poor friend, you are a false witness.

Mr. Blanc being called deposed to a conversation with madam Manson, in which she said her testimony would convict the accused. Madam Manson denied having had any such conversation. The widow Bancal then exhorted her to tell the truth, upon which madam Manson threw upon her a glance full of indignation and contempt. Bastide joined in the entreaty. At which, she exclaimed: "wretch you know me not and yet wished to murder me." At these words, pronounced with vehemence, the hall resounded with applause. Madam Manson fell into a swoon, and on recovering was entreated by Fualdes to disclose the truth; upon which she fell into another swoon, and the court adjourned.

At the opening of the court the next day, the president made another touching appeal to madam Manson. He

concluded by saying: "It has been said that an oath was taken upon the corpse, can you say nothing upon this subject?"

Madam Manson. You may easily imagine, sir, that I had not sufficient coolness to class all the details in my mind; but that which can never escape my memory is, that a horrible man wished to murder me. *President.* Some one wished to kill you—and somebody saved you? *Madam Manson.* Yes, somebody saved me. *President.* Was this man among the assassins, or did he arrive accidentally to save you? *Madam Manson.* I cannot say whether he came from without or was of the number of the assassins, but I shall never forget that he rescued me from the hands of that wretch.

President. Was the person who drew you out of the closet the same who conducted you to the church of the Annunciation? Yes sir. *President.* Can you not recall the features of this unknown? I do not recall any thing.

President. Is that person among the accused? *Answer.*

It is possible, sir, (and all eyes were fixed upon Jausion.

Dubernard (rising). Please to explain yourself, madam.

Your half avowals, your ambiguous responses, are a thousand times more murderous than a direct designation. *Madam*

Manson. I have nothing to say. *Jausion.* Madam, it is not for me; death has no terrors for me: but for my wretched wife, and my poor children, that I wish you to speak; my life is in your hands; it rests with you to save me or send me to the scaffold *Madam Munson*, (with an expression of misery). I can neither save nor condemn Jausion. . . .

The day following Mr. France de Lorne testified to the conversation which he had held, in the presence of others, with Madelaine Bancal. She stated that after retiring to bed she heard a noise in the street, which frightened her; that she went down in her night dress, without shoes, and concealed herself in a bed near the door of the kitchen;

through a crevice she saw a number of persons enter dragging in a gentleman; Bastide and Jausion were of this number—and the latter was called by name by a woman, who, with another woman, were employed in fastening the door; that one of these ladies was taller and more majestic than madam Manson and wore a white bonnet with green plumes; the gentleman was thrown upon the table and made to sign certain bills of exchange, which were presented by Bastide and Jausion; that Jausion gave him a severe blow with a sharp knife which he had brought under his dress, but his trembling compelled him to desist, and the deed was completed by Bastide and Missonnier; Colard and Bancal held his feet, and the woman Bancal stirred up the blood with her hand as it fell into the bucket which was held by Anne Benoit. A lame gentleman held the light. At the moment after he was stabbed, Bastide heard a noise in the closet adjoining the kitchen. He demanded if there was any one in the house; the woman Bancal answered that there was a woman in the closet. Bastide said it was necessary to kill her. Madam Manson then stepped forth and threw herself at the feet of Bastide. She was compelled to place her hand upon the breast of the corpse. Bastide wished to assure himself whether there was any one in the bed. She pretended to be asleep—and Bastide twice passed his hand over her body, and said to the woman Bancal it was necessary to put the child out of the way. She agreed to get it done for four-hundred francs. The plan was to place the dead body in his bed with a razor by his side; but this project was abandoned when it was reported by Jausion that it was impossible, because some one was at the window. They then determined to carry the body to the river; and the woman Bancal washed the table and floor which were covered with blood. Bancal did not return all night.

Madam Manson being interrogated anew by counsellor

Pinaud and requested to state particularly what occurred between the time of her coming out of the closet and her going into the street, answered : "I took an oath." *Pinaud.* Who required it? *Answer.* Bastide. *Pinaud.* Where did you take it? *Answer.* At the foot of the corpse. *Pinaud.* What persons were around the corpse? *Answer.* There were many. There were other persons besides Bastide. *Pinaud.* Who were these persons? *Answer.* I cannot name them. I am accused. *Pinaud.* Madam, I beseech you, and, if it be necessary, I require you to name them. *Madam Manson.* I shall not name the others.

Marianne Viala testified that she communicated the news of madam Manson's arrest to the woman Bancal, and that the latter answered. "Ah! the b——, she deserves it as well as the rest; she stood sentinel at the door, while the others were killing him."

On the 7th of April, the woman Bancal yielded to the reproaches of her conscience and the solicitations of her counsel, and made a confession. She stated that on the 19th of March, at half past eight o'clock in the evening, six persons entered her house, dragging in Fualdes by the arms and collar; she recollected Bastide distinctly, and one of the others was, she thought, a Spaniard; her husband was unwilling to tell the names of the persons she did not know, but he assured her that one of them was a nephew of Bastide. Bach and Colard were of the six who entered together. The latter went out of the kitchen, saying, where have you brought me? He returned in a few moments. Fualdes said something and Bastide answered, but she did not hear what it was. She and her husband attempted to leave the room, but were prevented by Bastide, who threatened them with death if they stirred a step. She fell with a chair, supporting her head with her hands, and her husband seeing her indisposed conducted her to the stairs. When she left the kitchen Missonnier had not arrived.

Bousquier arrived a long time after. She did not see Anne Benoit there at all,—nor madam Manson. The attorney remarked that it was very evident that both Bach and Bancal kept back all the circumstances which tended to establish their participation in the crime. When particularly interrogated this witness was not able to affirm positively that Jausion was one of the persons.

After the arguments by the counsel had commenced, and had continued for some time, the president announced that he had received a new confession from Bach, which he proceeded to read. In this confession he stated that he saw Jausion compel Fualdes to sign certain papers, which Jausion then put in his pocket. He then repeated the details of the assassination,—the giving of the first blow by Jausion—the rest by Bastide—the holding of a bucket to receive the blood by madam Bancal, &c. &c. Jausion went out, and a few moments afterwards a noise was heard in an adjoining closet. Bastide demanded of madam Bancal the cause of it, and she answered that there was a woman there—upon which Bastide opened the door and drew out madam Manson, dressed in male clothing—and that Bastide was about to kill her, when Jausion came in, interposed, and saved her life, upon her taking an oath of secrecy upon the dead body. Madam Manson did not deny the facts stated by him.

[The report goes on to give copious extracts from the speeches of the counsel, and to state the effect produced upon the audience, by their eloquence. This article is already so long, that it is found necessary to omit this part of the report.

It will be remembered that the trial at Albi commenced on the 25th of March. It terminated on the 5th of May, having extended therefore through a period of about forty days. After madam Manson's advocate had concluded his speech in her defence, she was herself permitted to address the court and jury, which she did in the most touching

manner. She recapitulated all the details of the assassination, and when speaking of the attempt of Bastide to destroy her at the time, and her preservation by the intervention of another person, she exclaimed : "if my preserver was guilty, is he the less my preserver?" She excused her singular course of conduct, by alleging that she was constantly in fear of her life—if she testified—that she was even haunted by the recollection of the dreadful scene she had witnessed, and the terrible oath she had taken, and that surrounded by terrors, intimidated by threats, her energy had given way, and she had adopted that fatal "system of variations," which she now so bitterly repented. She reminded the jury, that her actions had constantly betrayed her, and given the lie to her oral assertions. This appeal from a feeble and unfortunate woman was not without its effect. She was unanimously acquitted.

The woman Bancal, Jausion, Bastide, Colard and Bach were convicted of murder, with premeditation, Anne Benoit of murder without premeditation, Bastide and Jausion of breaking and stealing—Missonnier, Bach, Colard, Bastide and Jausion of drowning the corpse. Bastide, Jausion and Colard were executed, protesting their innocence to the last. Bach was recommended to the royal clemency, and his sentence was commuted.

The reporter remarks, in conclusion, that though ten years have elapsed since the commission of the crime, nothing has occurred to throw any new light upon the mystery.]

H. G. O. C.

New Bedford, Mass.

ART. VIII.—DIGESTS OF AMERICAN REPORTS AND AMERICAN
LAW PERIODICALS.

We noticed in our last number, under the title of *American Reports*, five hundred and forty-five volumes of reports.

In order to render these volumes of convenient use to the reader, there have been published from time to time digests of their contents. Without such assistance, the most inveterate book lawyer must have abandoned the use of reports in utter hopelessness; and, even with the aid of the best arranged digests, the task of examining the existing state of American law, in these recorded *responsa prudentum*, is truly formidable; since even the best arranged digests serve only as indexes to the reports and the experience of every accurate lawyer teaches him how utterly unsafe it is in any instance to rely merely on the digest, when it is possible to consult the report at large.

In what way this evil of numerousness will be remedied, or how it will cure itself, is certainly as yet an "open question;"—as such we leave it, our present purpose being to give a bibliographical account of the digests; and in so doing we shall follow the same order as was followed in regard to the reports. To this account of the digests, we shall add a bibliographical account of the law periodicals, which have appeared in this country. We proceed first to notice the digests.

United States Courts. In 1821, Henry Wheaton, reporter to the supreme court, published a digest of the decisions of the supreme court, from its establishment in 1789, to February term, 1820, including the cases decided in the continental court of appeals in prize causes during the war of the revolution. In 1829, a continuation of Wheaton's digest, by two gentlemen of the New York bar, was published, including the reports in the supreme court from 1821 to January term, 1829—also the cases in the district and circuit courts from the commencement of the reports. In the same year, Richard S. Coxe published a digest of the decisions in the supreme, circuit, and district courts of the United States.

In 1833, Richard Peters, reporter to the supreme court,

published the first volume of his full and arranged digest of cases decided in the supreme, circuit, and district courts from the organization of the government of the United States. This work was completed in 1839, by the publication of the second and third volumes.

In 1839, George Ticknor Curtis published a digest of cases adjudicated in the courts of admiralty of the United States and in the higher court of admiralty in England.

In those states which are not mentioned we believe no separate digests have been published.

Maine. In 1835, Simon Greenleaf published a digest of the nine volumes of Greenleaf's reports. It is usually bound with the ninth volume of his reports.

Vermont. We understand that Peter T. Washburn, of the Vermont bar, is engaged in preparing a digest of all the reports of this state.

Massachusetts. In 1818, Lewis Bigelow published a digest of the first twelve volumes of Massachusetts reports, and in 1825, he published a new edition containing a digest of the seventeen volumes of Massachusetts reports and the first of Pickering.

In the same year, Theron Metcalf published a digest of the five last volumes of Massachusetts reports and the first of Pickering.

In 1830, Lewis Bigelow published, as a supplement to his former volume, a digest of Pickering's reports from the second to the seventh inclusive. In 1831, Willard Phillips and others published a digest of Pickering's reports from the second volume to the eighth inclusive.

In 1837, Francis Hilliard published a digest of Pickering's reports from the eighth to the fourteenth inclusive.

We understand that J. C. Perkins and J. H. Ward are preparing a new digest of all the Massachusetts and of all Pickering's reports, to include the eighteenth, nineteenth and twenty-second of the latter, not yet published.

Connecticut. In 1833, Henry Dutton published the Connecticut digest, comprising the decisions in Kirby, Root, the five volumes of Day, and the first seven and a part of the eighth of Connecticut reports, with some decisions in other reports. Mr. Thomas Day, the state reporter, has in press a complete digest of all the reports of this state to the present time.¹

New York. In 1815, William Johnson published a digest of the cases decided and reported in the supreme court of judicature and the court for the correction of errors from January term, 1799, to October term, 1813, inclusive.

In 1821, Rodney S. Church published in two volumes a digested index to the reports of the supreme court and the court for the correction of errors, including Coleman's cases, Caines's cases, Caines's reports, Johnson's cases, Johnson's reports, eighteen volumes and the first part of the nineteenth, and Anthon's *Nisi Prius*.

In 1825, William Johnson published in two volumes a digest of the cases decided and reported in the supreme court of judicature, the court of chancery, and the court for the correction of errors from 1799 to 1823.

In 1831, Esek Cowen published a digested index to the nine volumes of his reports.

In 1836, John L. Wendell published a digest of the cases reported in the first thirteen volumes of his reports.

In the same year, Stephen Cambreleng, T. W. Clerke and E. Hammond published in two volumes an analytical digest of the reported cases in the supreme court of judicature and the court for the correction of errors of the state; together with the reported cases of the superior court for

¹ In his prospectus Mr. Day says; "It has been a prominent object of the compiler, and one which he has never lost sight of, to make the work a *substitute* for the original reports—not indeed in every instance, for this is impossible;—but always to state concisely, in connection with the point decided, all the facts in the case which bear upon and materially affect the decision."

the city and county of New York, from the earliest period to the present time.

In 1838, there was published a supplement to Johnson's digest, being a digest of all the reported cases in New York from 1823 to 1836.

New Jersey. In 1815, Charles Kinsey published in one volume an abridgment or digest of the decisions of the supreme court from 1806 to 1813.

In 1830, William Halstead published a digested index to the decisions of the superior courts of this state.

Pennsylvania. In 1822, Thomas J. Wharton published a digest of the reported cases adjudged in the several courts held in Pennsylvania, including those in the United States circuit and district, as well as those in the state courts.

In 1829, he published a second edition including the cases in the fifteenth of Sergeant and Rawle's reports. And in 1836, he published the second volume of his digest.

Maryland. In 1829, James Raymond, of the Maryland bar, published the digested chancery cases, contained in the reports of the court of appeals of Maryland. In his general plan, the editor seems to have followed Petersdorff's abridgment.

Virginia. In 1819, William Munford published a general index to the Virginia law authorities, reported by Washington, Call, Henning and Munford jointly, and Munford separately.

In 1825, Everard Hall published a digested index to the Virginia reports, containing all the points argued and determined in the court of appeals from Washington to the second volume of Randolph inclusive.

North Carolina. The North Carolina reports are included in Wharton's digest of Southern and Western reports.

South Carolina. In 1824, there was published by a member of the Charleston bar a digest of the cases reported in the constitutional court. William Rice, state reporter,

published a digest of the reports of this state, in two volumes, the first of which appeared in 1838, the second in 1839.

Alabama. John L. Dorsey, Esq. has in press, or has recently published a digest of the sixteen volumes of Alabama reports.

Louisiana. In 1826, William Christy published in one volume a digest of Martin's reports as far as the fourth volume of his new series.

In 1834, Messrs. Benjamin and Sliddel published a digest of the Louisiana reports.

Tennessee. In 1836, Mr. Holman published a digest of cases in the courts of Tennessee from 1796 to 1835.

Kentucky. In 1832, Henry Pirtle, under the patronage of the legislature, published a digest of the decisions of the court of appeals, in two volumes.

Ohio, Indiana, Illinois. In 1834, James F. Conover, of the Cincinnati bar, published a digested index of all the reported decisions in law and equity of the supreme courts of the states of Ohio, Indiana and Illinois, embracing the first five and the first part of the sixth of Hammond's reports, the first volume of Blackford, and Breese's reports.

Digest of Southern and Western Reports. A digested index to the reported decisions of the several courts of law in the Southern and Western states was published in 1824, by Thomas J. Wharton. In his advertisement Mr. Wharton says; "This index contains a systematic arrangement of the cases decided and published in the following states; Maryland, Virginia, since the publication of Munford's digest, North Carolina, South Carolina, Kentucky and Tennessee."

In addition to the foregoing, there has been published in five volumes, a digested index to the reported decisions of the several courts of law in the United States. The first, published in 1813, by John Anthon, the second in 1816, by Thomas Day, the third in 1824, and fourth in 1825, by T. J. Wharton, the fifth in 1830, by G. S. Smith and F. J.

Troubat. These volumes are usually called the **American digest**.

In 1810, Samuel Bayard published in one small volume a digest of American cases on the law of evidence.

In 1814, Nicholas Baylies published in three volumes a digested index to the modern reports of the courts of the common law in England and the United States.

In 1822, there was published in New York a digest of American reports in equity.

In 1828, John D. Campbell and Stephen Cambreleng published the American chancery digest, being a digested index of all the reported decisions in the United States courts and the courts of the several states.

In 1833-4, 5 and 6, J. D. Wheeler, of New York, published in eight volumes a practical abridgment of American common law cases argued and determined in the courts of the several states and the United States courts from the earliest period to the present time. In his preface, the editor says, "the plan adopted by Petersdorf has been pursued in this abridgment."

In 1837, O. L. Barbour and E. B. Harrington published in three volumes, an analytical digest of the equity cases decided in the courts of the several states and of the United States, from the earliest period; and of the decisions in equity in the courts of chancery and exchequer in England and Ireland, and the privy council and house of lords, from Hilary term, 1822.

We understand that Theron Metcalf, the present reporter of the decisions of the supreme court of Massachusetts, and J. C. Perkins, of Salem, Mass., are engaged in preparing an analytical digest of the decisions of the American courts of common law and admiralty, to be published in three volumes, the first of which will appear during the present month. The union of talent, skill, learning and industry, brought to the work, are a good pledge that it will be well executed.

We come now to notice the various American Law Periodicals.

The Law Journal. In 1808, John E. Hall, of Baltimore, commenced the publication of the American Law Journal and Miscellaneous Repository. This work was published quarterly, and contained reports of cases in the United States courts and state courts, opinions of eminent counsel, notices of law publications, essays on legal questions, congressional and parliamentary debates, and information respecting the most important laws of the different states. The second volume appeared in 1809; the third in 1810. The third and fourth numbers of the third volume are wholly occupied with a treatise on the law of war, translated from the Latin of Bynkershoek, by Peter S. Duponceau.

The fourth volume did not appear till 1813. The first two numbers of the fifth volume published in 1814 are wholly occupied with Mr. Jefferson's instruction to counsel, and Mr. Livingston's reply in the case of the New Orleans Batture.

To the sixth volume, which appeared in 1817, a supplement was added, containing the acts passed during the first session of the fifteenth congress.

The work was recommenced in 1821, under the title of Journal of Jurisprudence, but was discontinued after the publication of one volume of the new series.

The Carolina Law Repository. This work, which was commenced in North Carolina in 1813, was noticed in the article on reports and reporters.¹

United States Law Journal. In June, 1822, appeared the first number of the United States Law Journal and Civilian's Magazine, edited by several members of the (Connecticut and New York) bar. In its character it was similar to Hall's Law Journal. The three following numbers of the first volume were published in the ensuing months

¹ Vol. xxii p. 130, Am. Jur.

of September, January and April. Only two numbers of the second volume were published, and these did not appear till January and April, 1826.

Griffith's Law Register. In 1822, William Griffith published two large octavo volumes, under the title of the Annual Law Register. These were numbered the third and fourth volumes, the paging, which is continuous, amounts to 1452 pages. They comprise a great body of very highly valuable legal information, respecting the institutions, and the rights of persons and things in each of the twenty-four states then in existence—together with a far more accurate and complete American legal bibliography than had before been published. Most of the matter was obtained from the answers of gentlemen of experience and eminence at the bar, to a series of questions proposed to them by the editor. The great fault of the work is a want of methodical arrangement. No other volumes than the two here mentioned ever appeared.

The American Jurist and Law Magazine. The publication of this journal was undertaken in January, 1829,—since which time it has appeared quarterly without interruption, except the number for October, 1837, which did not appear till January following, on account of the destruction by fire of a large part of the edition.

Those, if any there are, who may be desirous of becoming and who are not already acquainted with the character of this work, are referred to the address to the public, prefixed to the first volume, and particularly to the first article in the nineteenth volume, on the plan and objects of the American Jurist and Law Magazine.

Law Intelligencer. In January, 1829, Joseph K. Angell, commenced at Providence, R. I., the United States Law Intelligencer and Review. The plan of the work was, "to afford seasonable and accurate intelligence of whatever may be interesting relative to the science of law, and the

practice and constitution of courts of justice." It appeared monthly, in octavo form, and was continued three years—the numbers for each year constituting a volume.

Journal of Law. In July, 1830, there was commenced at Philadelphia the *Journal of Law*, conducted by an association of members of the bar. It was principally devoted to legal essays. It was published semi-monthly, each number containing 16 pages 8vo, and continued only one year.

The Jurisprudent. This work was commenced in Boston in July, 1830, at the same time with the last mentioned. It appeared weekly, in a quarto form, and was continued one year. The numbers constitute a volume of 416 pages.

The Carolina Law Journal. In the same month with the two last, Messrs. J. Blanding and D. J. M'Cord, of South Carolina, commenced a publication under the above title—and probably its career was even more brief than theirs, as we have never heard of its continuance.

Law Reporter. In March, 1838, P. W. Chandler, of the Suffolk bar, commenced the publication of this work. The second number did not appear till June of the same year, since which it has been issued monthly in form of a royal octavo magazine of 32 pages. Its principal object, as its name implies, is to give to the profession *immediately*, so far as it can be done by a periodical work of frequent publication, accurate and condensed reports of the most important cases decided by the superior courts of civil and criminal jurisdiction. In the prosecution of this plan it includes some cases in courts which have no reporters, and cases at *nisi prius*. The work also embraces in its plan digests of recent decisions, legislation, critical and obituary notices and miscellany.

Of all these periodicals, it is hardly necessary to remind our readers, that two only, our own and the *Law Reporter*, are still in existence. The others, we believe, have all perished, for want of the needful encouragement.

ART. IX.—PIRACY OF MARKS OR SIGNS OF MERCHANTS AND TRADERS.

[From the *Law Magazine*, vol. xxii. p. 148.]

It is well known that commercial men have long been in the habit of affixing to their different goods and merchandise certain arbitrary marks or signs, by which they may be distinguished from similar articles belonging to other persons in the same trade. These marks usually consist of fanciful words or devices, sometimes with and often without the name or initials of the owner. The convenience of the plan seems obvious, and cannot be more clearly evinced than by the fact that its general use has led to the establishment, in almost every branch of business, of a sort of conventional or technical language, whereby not merely the species, but the quantity, and degrees of quality, of the goods are ascertained and referred to through the medium of such symbolical distinctions. Some of these vocabularies and characters are so peculiar as to be utterly unintelligible beyond the sphere of their immediate application, and not unfrequently beget a ludicrous association of ideas in uninitiated minds. In very many instances the knowledge and use of them are not confined to the members of the trade, but extend to the great body of the consumers and customers. In all cases the reliance placed upon them is most implicit, and, from the foreign and wholesale commerce of the greatest mercantile houses down to the more humble retail dealer, any violation of good faith in the employment of them cannot but be attended with most prejudicial consequences. Whenever such a violation occurs, it may be very properly regarded in the twofold light of an invasion of a private right, and a fraud upon the public. It is proposed to consider, how far the right to the exclusive enjoyment of these marks or signs has become judicially recognised, and what are the remedies which exist

for its infringement, either at law or in equity. In the first place, we shall take a brief review of the cases at law.

The earliest which we find is in Popham's Reports, page 144, where Mr. justice Doddridge mentions a case in the 22d of Elizabeth as follows: "An action was brought upon the case in common pleas by a clothier, that whereas he had gained great reputation by the making of his cloth, by reason whereof he had great utterance to his great benefit and profit; and that he used to set his mark to his cloth, whereby it should be known to be his cloth; and another clothier perceiving it, used the same mark to his ill made cloth, on purpose to deceive him; and it was resolved that an action did well lie."

In the case of *Sykes v. Sykes*, 3 B. & C. 541, the plaintiff had been in the habit of affixing the mark, "Sykes's Patent," to shot belts and powder flasks manufactured by himself, and his articles were well known by that distinction. The plaintiff had then in fact no subsisting patent. The defendant, also named Sykes, made use of the same mark on similar articles manufactured by him, and the plaintiff brought his action, alleging that the defendant sold his articles as and for those of plaintiff, and that defendant's goods were of inferior quality. The jury found a verdict for the plaintiff, and the court refused a new trial. Lord Tenterden said, "It is established most clearly that the defendants marked the goods manufactured by them with the words 'Sykes's Patent,' in order to denote that they were of the genuine manufacture of the plaintiff, and although they did not themselves sell them as goods of plaintiff's manufacture, yet they sold them to retail dealers, for the express purpose of being resold as goods of the plaintiff's manufacture. I think that is substantially the same thing, and that we ought not to disturb the verdict." The next and last case, at law, upon the subject is *Blofield v. Payne*, 4 B. & Adol. 410. The declaration stated that the plaintiff

was the inventor and manufacturer of a metallic hone for sharpening razors, &c., which hone he was accustomed to wrap up in certain envelopes, containing directions for the use of it, &c., and that the said envelopes were intended, and served to distinguish the plaintiff's hones from those of all other persons; that the defendants wrongfully, and without his consent, caused a quantity of metallic hones to be made and wrapped in envelopes resembling those of the plaintiff, and containing the same words, thereby denoting that they were of his manufacture, which hones the defendants sold, so wrapped up as aforesaid, as and for the plaintiff's, whereby the plaintiff was prevented from disposing of a great number of his hones, and they were depreciated in value and injured in reputation, those sold by the defendants being greatly inferior. The defendant pleaded the general issue. At the trial, the questions left to the jury were, first, whether the plaintiff was the inventor or manufacturer, and secondly, whether the defendant's hones were of inferior quality, but lord Denman stated to them that, even if the defendant's hones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants. The jury found for the plaintiff one farthing damages, but stated that they thought the defendant's hones were not inferior to his. A motion for a nonsuit, on the ground of there having been no special damage, was refused: Mr. Justice Littledale said, "The act of the defendants was a fraud against the plaintiff, and if it occasioned him no specific damage, it was still to a certain extent an injury to his right." Mr. Justice Patteson said, "It is clear the verdict ought to stand; the defendants used the plaintiff's envelope and pretended it was their own; they had no right to do that, and the plaintiff was entitled to recover some damages in consequence." From these authorities it may be considered as clearly established, that the exclusive

enjoyment of a particular sign, mark or label, is the subject of a legal right, and that an action at law may be brought for an invasion of the right, even though no special damage have been sustained thereby.

It generally happens, however, that the injury caused by the piracy of a mark or sign is too complicated and ramified to be easily computed, and it may be wholly irreparable. It is not limited to the immediate pecuniary loss of profits, by the supply of the market *pro hac vice* with the spurious commodity, but it detracts from the goodwill, and often, being resorted to for palming off an inferior article, assails the trading reputation of the rightful owner. Whatever redress can be obtained in a court of law by way of damages for past *tort*, may be a very inadequate remedy. It is, therefore, in the next place, proposed to inquire what assistance can be afforded by a court of equity. The inadequacy of the legal remedy, under the circumstances just mentioned, appears to bring the case directly under the ordinary equitable jurisdiction by injunction; and we proceed to ascertain whether the authorities bear out this view.

Until the last case of *Motley v. Downman* (post, p. 154), the only reported case directly bearing upon the equitable point was of ancient date, and rather tended to discountenance than support the granting of injunctions to secure the exclusive use of marks or signs: we allude to *Blanchard v. Hill*, 2 Atk. 485, in which a motion was made on behalf of the plaintiff, for an injunction to restrain the defendant from making use of the *Great Mogul* as a stamp on his cards, to the prejudice of the plaintiff, upon the suggestion that the plaintiff had the sole right to this stamp, having appropriated it to himself conformably to the charter granted to the Card Makers' Company by King Charles the First. Lord Hardwicke refused the injunction, mainly on the ground of the invalidity of the charter; but in the course of his judgment he delivered sundry general dicta upon the subject of

marks. "The motion is to restrain the defendant from making cards with the same mark which the plaintiff has appropriated to himself, and in this respect there is no foundation for this court to grant an injunction. Every particular trader has some particular mark or stamp, but I do not know any instance of granting an injunction here to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it." Alluding to the beforementioned case at law, cited in Popham's Reports, Lord Hardwicke proceeds, "It was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design to put off bad cloths by this means, or to draw away customers from the other clothier; and there is no difference between a tradesman putting up the same sign and making use of the same mark with another of the same trade." He then states that if the injunction is to be obtained, it must be on the charter of the crown, and after showing the illegality of the charter, his lordship added, "An objection has been made, that the defendant, in using this mark, prejudices the plaintiff, by taking away his customers; but there is no more weight in this than there would be in one innkeeper setting up the same sign with another."

It is probable that nearly a century ago, when the above case arose, marks or signs did not occupy so prominent and influential a place in mercantile transactions as they do now, because, allowing that a balance of mischievous consequences or hardships is a proper mode of deciding upon such a question, it seems palpable, that the preponderance of evil results must now be greatly on the side of permitting the piracy to be practised with impunity.

The case of *Canham v. Jones*, 2 V. & B. 218, is sometimes cited as carrying out Lord Hardwick's opinion; there a bill was filed for an injunction, to restrain the defendant from selling a medicine under the title or sign of "*Velno's Vegeta-*

ble Syrup," alleging that the plaintiff was solely entitled to the recipe for preparing the medicine, and that the defendant sold a spurious article under the same name. The defendant put in a general demurrer for want of equity, which was allowed by sir Thomas Plomer, on the ground that the plaintiff had claimed an exclusive right to the medicine, which he could not maintain, and that the defendant did not in fact represent that he sold the plaintiff's medicine, but merely one of as good a quality, which he was perfectly at liberty to do. It seems scarcely necessary to point out, that the wrong there complained of was not the piracy of the plaintiff's mark, but of the recipe for the medicine; and fraudulent representation being out of the question, this decision is in reality no authority against the equitable interference under consideration. The next case, of which any printed note is extant, is *Day v. Day*, Eden on Injunctions, 314, where an injunction was granted to restrain a manufacturer of blacking from using labels in imitation of those employed by the plaintiff.

Many injunctions of this description have been granted by the present vice chancellor, but none of the cases have appeared in the reports of that Court, although several are well known to counsel, and are often referred to. Among the principal are: 1, a case relating to watches exported to Turkey, having inscribed thereon, as a mark or sign of the plaintiff, a word in foreign characters, signifying "warranted," which was pirated by the defendant; 2, a case of *Ransome v. Benthall*, (1st December, 1833,) where the defendant had used on ploughshares the mark "H. H.," which belonged to the plaintiff; an injunction was granted, after opposition, the vice chancellor observing, that he had examined the specimens and private marks, and it was evident the defendant had used the plaintiff's marks for the purpose of fraud, and he would therefore grant the injunction to the fullest extent, for the protection of the plaintiff

and the public: 3, *Hutton v. Forster* (24th December, 1833), in which an injunction was granted (also after opposition), to restrain the defendant from using on the wrappers of woollen goods, exported to the Gold Coast of Africa, certain fanciful devices of the plaintiff's, painted in bright and glowing colors, which had been found most effective in attracting the custom of the natives.

In addition to these traditionary authorities there have very recently appeared, in the Equity Reports, three other cases, which, considering the great importance of the subject, and the previously unsatisfactory state of the authentic records of the law thereon, cannot but be of essential service to the profession and the public. The first of these cases is *Knott v. Morgan*, 2 Keen's Reports, 213. Certain of the proprietors of the London Conveyance Company filed a bill for an injunction against the defendant, stating that their omnibuses were of a novel and superior construction, and that the defendant, with the view of fraudulently depriving the plaintiffs of custom, began to run an omnibus on the same line of road as the plaintiffs, on which was painted "*Conveyance Company*," and "*London Conveyance Company*," so as to resemble the same words on the omnibuses of the plaintiffs; and that certain symbols on the defendant's omnibus were also imitations of the plaintiffs. It appeared that the defendant had made some colorable variation in his inscriptions, and an injunction was granted to restrain the use on the defendant's omnibus of the above words, or any other names, words or devices, in such manner as to form or be a colorable imitation of the names &c., on the omnibuses of the plaintiffs.

The master of the rolls observed, "The only question is, whether the defendant fraudulently imitated the title or insignia used by the plaintiffs for the purpose of injuring them in their trade. It is not to be said that the plaintiffs have any exclusive right to *the words*, but they have a right to

call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property."

The next case is *Motley v. Downman*, 3 M. & Cr. 1. The facts were shortly thus.—The mark 'M. C.' had long been used to distinguish tin manufactured at particular works in Carmarthen. The plaintiff had been a *lessee of those works*, and had used the mark *there*. He subsequently removed to other tin-works, about forty miles distant, and continued to use the mark 'M. C.' at the latter works during several years, while the Carmarthen works were unoccupied. Afterwards, the defendant took the Carmarthen works, and commenced using the mark on tin manufactured there. The vice chancellor granted an injunction to restrain the defendant from using the mark, but on appeal the lord chancellor reversed his honor's decision, on the ground that the mark, having been once attached to the Carmarthen manufactory, the real question was, whether the plaintiff had acquired a right to prevent the tenants of those works from enjoying it. His lordship said, if the case had stood upon the use of the mark by the plaintiff, and there had been nothing but the fact of another company, forty miles off, assuming the same mark, the injunction would have been granted, even though the defendants had made an addition to the mark, which was not sufficient to prevent deception. This case was not one of mere piracy, because there the defendant relied on an earlier title, which the plaintiff must supersede before he could establish an exclusive right in himself, and the lord chancellor clearly recognised the general right of the lawful owner of a mark to restrain the piracy of it. It is worthy of observation, that in the last case is to be found an element not contained in any of the preceding authorities; namely, that a mark may be attached to a particular manufactory, so as to be enjoyed as appendant or appurtenant thereto, and

that non-user for a considerable length of time, during which the manufactory was unoccupied, will not necessarily destroy the right.

Whatever doubts may have formerly prevailed, it may with confidence be said, that the foregoing investigation unequivocally shows that courts of equity will now interfere by injunction to prevent the piracy of marks or signs used in trade. This remedy is no less speedy that it is sufficient:—a bill is filed, praying for an injunction, and usually asking, at the same time, for an account of the profits made by the piratical use of the mark; the injunction is granted on motion, either *ex parte* or after notice to the defendant, according to circumstances. If the plaintiff files his bill immediately or without any unnecessary delay after he discovers the piracy, he may obtain his injunction at once; and it is curious to remark, that the court which has acquired the reputation of being proverbially cumbrous and tardy in its machinery and movements, is on these occasions made one of the most prompt and summary tribunals in the country; a few hours only being necessary for procuring its aid in matters involving interests and property of the greatest importance and value.

The spirit of rivalry now so extensively pervading every branch of trade, and the unfair means often resorted to by the unscrupulous and overreaching, has lately brought this subject into such general discussion as fully to justify these observations, which, it is hoped, have placed the law in a perspicuous light, although they are insufficient completely to exhaust the topic.

ART. X.—ON MISTAKES OF LAW.

THE question has been much considered in courts of justice and by writers on jurisprudence, whether a man should be

held bound by his acts, done under a misapprehension as to his legal rights and liabilities; but, we conceive, it has never yet been so definitively settled, as to render further discussion of it altogether unseasonable. This question has arisen most frequently at law, where actions have been brought to recover back money. In such cases, it has been sometimes laid down as a rule, that if a party pay money under a mistake of the law, he cannot recover it back; but if he pay it under a mistake of the facts, he may reclaim it.¹ It has also been stated to be a maxim of equity, that contracts shall not be set aside on account of mistakes of law, though they will be for mistakes in matters of fact.² In our present discussion, we shall pay no especial regard to the distinctive powers possessed by courts of law and courts of equity,—our inquiry being, not what is the proper *forum* to resort to for redress, but whether mistakes of law may furnish a sufficient ground for relief in any tribunal.

It has been fitly said, *the reason of the law is the life of the law*. It is material, then, to inquire, in the outset, whether the alleged distinction between mistakes of law and of fact is capable of being sustained, on principle. And if, upon examination of the subject, we shall arrive at the conclusion that there is no substantial ground for such a distinction, then, in conformity to the rule, *where there is the same reason there should be the same law*, we shall submit, that the distinction *ought* not to exist.

It is the dictate of natural justice, that every man should be permitted to hold and enjoy what is his own, and that no other should be suffered to take or detain it from him, without cause. In accordance with this principle, if a party, intending to act upon his rights, has paid money, which facts, subsequently disclosed, show was not due, he is allowed to recover it back; for he has, contrary to his

¹ *Milnes v. Duncan*, 6 Barnw. & Cresw. R. 671.

² *Marshall v. Collett*, 1 Younge & Coll. R. 232.

real intention, parted with his money when he was under no obligation to do so, and the other party has obtained what he is not entitled to; and he must, therefore, restore it to its rightful owner. Suppose, now, that in circumstances precisely similar, in other respects, he has paid the money purely under a mistaken notion in regard to his legal liability. Still, it is equally true as in the other case, that he intended simply to fulfil his real obligations; that no money was in fact due, and so his property has passed from him without consideration or cause; and that the other has received money to which he has no right.

How, in truth, do the two cases actually compare with each other, throughout? The immediate inducement to the payment, in both cases, was the party's misapprehension as to his liability. He paid the money, because, at the time, he thought himself bound to pay it. But it turns out, that he was under no such obligation, in either instance. Thus far the cases are alike. They differ in this. In the one case, the party subsequently learns, that the facts were not as he supposed them to be, when he judged himself liable. In the other, he ascertains that the law did not, as he had believed, hold him obligated. In one case, he assumed a wrong state of facts, from which, however, he drew a legitimate conclusion; in the other, he drew a wrong inference from a known state of facts.

We do not, then, perceive why, on the simple principles of reason and justice, the party should be deemed to have forfeited his right to reclaim and hold what is his own, more in the one case than in the other. Precisely the same considerations are equally applicable to both. If the distinction in question is to be sustained at all, the foundation of it must be sought in motives of policy, or in something else independent of the mere merits of the case.

The ground of the distinction between ignorance of law and ignorance of fact has been stated to be, that every

man of reasonable understanding is presumed to know the law, when he knows all the facts, but that no person can be presumed to be acquainted with all matters of fact; and, therefore, ignorance in the former case imports culpable negligence, but not so in the latter.¹ We have slight respect for presumptions, unless they have some sort of foundation to rest upon. That this presumption of universal knowledge of the law is so, because it is likely to be conformable to the fact, is not pretended. To suppose that every man should actually know, as if by intuition, the precise effect of all the laws operating upon his property and rights, were utterly preposterous. But facts,—not all matters of fact,—but all the facts that concern the particular case in hand, a person may, as we think, ordinarily ascertain, by the use of reasonable diligence.

Let us test this same presumption by an example or two. A case arises, we will suppose, presenting a complicated series of legal questions, each difficult in itself, and of the effect of all which combined, a man of the nicest discrimination, the soundest judgment, and the most profound legal knowledge, can but form an opinion. And yet, forsooth, not he alone, but every one, so that he but have common sense, is presumed to know exactly what the law is, in such a case, and it is culpable negligence in him not to know it. Take another instance. An indorser of a note is called upon to pay it. His liability depends on the fact of a seasonable demand of the maker, and notice to himself. One would think this fact not very difficult to ascertain, and it would seem, that a man might reasonably be expected to require some evidence of his liability before he submitted to the demand. He has a right to such evidence, and it must be produced, and his liability affirmatively shown, before payment can be enforced by law. But he

¹ See 1 Story, Eq. Jurisp. 155.

pays the amount without having informed himself, that there have been no demand and notice. And the law says, he is not presumed to know that fact, and it is not culpable negligence in him to be ignorant of it. This account of the distinction in question is, to say the least, extremely unsatisfactory.

But the advocates of the distinction allege a necessity for the presumption, that every man understands the law. It is thus stated by lord Ellenborough: "otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."¹ As, by their own showing, the principal ground of the distinction is, that facts are more divers and more difficult to be known than the law, it would seem to be a fair inference, that mistakes of fact would be of more frequent occurrence than mistakes of law. If, therefore, such fearful consequences are to be apprehended from relieving against mistakes of law, *a fortiori*, the granting of relief in cases of mistakes of fact, one should suppose, must be attended with results, disastrous in the extreme. Yet, in this latter case, no such consequences are experienced.

Besides, the reasoning of lord Ellenborough, to have much force, implies that if the plea of ignorance is to be held sufficient in any case, it must, as a matter of course, be so held in all cases, where it is set up;—which will be so, when the courts shall have become so obliging as to admit, as valid, without discrimination, every excuse which a party may choose to advance, and not till that time. What would be thought, if a judge, in an action on a breach of contract, for instance, should urge it as an argument against the plaintiff's recovering, that, if he were allowed so to do, almost every body would be setting up similar claims. The truth is, there is small encouragement

¹ *Bilbie v. Lumley*, 2 East, R. 469; and see 1 Story, Eq. Jurisp. 123.

for a man to set up a breach of contract, unless he has some chance of making out his case. And, in like manner, what can it profit a party, to allege ignorance or mistake of the law, if he is wholly unable to substantiate the allegation? For mistake of law, like any thing else, every body admits, must be established by competent evidence.

And this disposes of an objection which has been made to granting relief in cases of mistake of law, that it would afford facilities for the practice of deception.¹ There can be little chance for successful deception, where a man is to be relieved, if at all, not on the mere pretence of his ignorance or mistake, but on reasonable proof of that fact.

Another ground that has been assigned for the distinction in question, and which is slightly inconsistent with lord Ellenborough's view of the matter, is, that mistakes of law can seldom or never be satisfactorily proved.² This is confounding two things, that are essentially distinct. Whether a party will be able to furnish satisfactory evidence of a mistake is one question; whether he shall be relieved against such mistake, when it has been fairly made out, is another and quite a different question.

If it be true, that mistakes of law can never be proved, then the question as to relief can never arise. But we do not admit, that mistakes of this kind are materially more difficult to prove, than mistakes of fact. For example, a man pays money, which he afterwards seeks to recover back, on the ground that he was, at the time of the payment, ignorant of a particular fact which went to exonerate him from paying the demand. He may prove that the fact in question did exist; he may show circumstances which render it highly probable, that, at the time, he was ignorant of that fact; but to make out this latter point, by direct,

¹ *Storrs v. Barker*, 6 Johns. Ch. R. 166.

² *Jones v. Watkins*, 1 Stew. R. 81.

positive testimony, is impossible, for the knowledge of it lies within his own breast. Suppose him, now, to allege, that he made the payment under a mistaken notion of his legal liability. He can prove that he was not, in fact, liable; he can show circumstances and acts clearly indicating, that, at the time, he thought himself liable; but any attempt to prove, by direct testimony, what was his actual belief, must fail, in this case as in the other, and for precisely the same cause.

And there is no reason why circumstantial evidence should not be admitted, to prove a mistake or ignorance of the law, as well as for other purposes. Neither do we perceive any valid objection to the use of reasonable presumptions. Thus, in pecuniary transactions, in the absence of any intimation to the contrary, it may be fairly presumed, because such is commonly the fact, that a man intends to fulfil his legal and just obligations, and nothing more; and, as the world goes, the maxim, *nemo præsumitur donare*, may be safely taken to be true,—for bounty seldom goes abroad without wearing its badge.

It has been stated as a further reason why mistakes of law should not be relieved, that the contrary practice would offer a premium to ignorance. This objection, we conceive, applies with equal force to granting relief against mistake or ignorance of facts. The argument rests upon the principle, that it is the policy of the law, to render men vigilant. But there is as much room for the exercise of vigilance in arriving at the facts of a case, as in ascertaining the law that is applicable to it; and a man may be remiss in the one respect, as well as in the other. It is admitted, that a party may recover back money overpaid by mistake of facts, though, by employing more diligence, he might have ascertained, before-hand, that the money was not due.¹

¹ *Waite v. Leggett*, 8 Cow. R. 195; and see 1 Story, Eq. Jurisp. 156.

Now, if, after having used equal diligence, he mistake his legal liability, it is not very obvious why, so far as the mere consideration of encouraging ignorance is concerned, the money should not be reclaimed in this case, as much as in the other.

Nor do we see any reason to apprehend serious consequences, in this respect, from granting redress in cases of mistakes of either kind. It is no great inducement to a man to pay money, for example, at a venture, that he may, should it prove not to have been due, recover it back by the lingering process of a suit at law.

We object, furthermore, to speaking of relief in such cases, as though it were something in the nature of a reward. The question is, not whether a man is to derive an advantage from his ignorance,—that nobody pretends,—but whether ignorance or mistake, wholly innocent in a moral point of view, shall subject him to the loss of his property.

Finally, it has been stated as the reason why money paid under a mistake in point of law, may not be recovered back, that litigation is not to be multiplied.¹ It is scarcely necessary to remark, that this reason, like the preceding one, is equally applicable to the case of recovering back money, paid under a mistake of facts. In either case, the recovery may cost a law-suit. Besides, though it is unquestionably true, that groundless litigation is to be discountenanced, it would comport singularly ill with the object for which courts are established, were they, from the fear of multiplying litigation, to refuse a hearing and redress to a suitor who had substantial justice on his side.

We have now noticed all the reasons we have seen assigned, for the alleged distinction between mistakes of law and of fact. We do not regard them as very convincing in themselves, or very consistent with each other; nor do we

¹ *Goodman v. Sayers*, 2 Jac. & Walk. R. 249.

believe it possible to produce reasonably satisfactory arguments to sustain such a distinction. Setting out from the position, that, as between man and man, every one is entitled to the possession and disposal of his own property, we maintain that, in a case where he was under no previous obligation, he cannot be deemed to have parted with it, by any act of his own, unless he has done such act, freely and voluntarily, with his eyes open, and his senses about him. He may, in that event, give away his property; he may sell it for the half, or for its full value; he may deal with it in a way, which others would deem wise or foolish; it matters not, so that he but act understandingly, and do not encroach upon the rights of any one else. The principal thing to be regarded is the intention with which he did the act. If he has deliberately and designedly given his property away, it is well, so far as the law is concerned. If, meaning to discharge his just obligations, and no more, he has paid money which, it matters not what circumstances, subsequently disclosed, show not to have been honestly due, then he has acted in the dark, his real intention has not been answered, his property has passed from him without his free and intelligent assent, and he ought not to be held thus to have divested himself of it. Besides, if all other difficulties were out of the way, it is not easy to perceive on what principle the other party could be permitted to retain what, in honesty, belongs not to him, but to his neighbor. The whole transaction would be in direct violation of that rule of the civil law, which is also the rule of reason and of justice: *Juris ignorantia non prodest acquirere volentibus, suum vero petentibus non nocet.*¹ The spirit of this maxim, we take to be, that ignorance or error shall not be made a pretence, for punishing a man with the loss of his own property, nor for rewarding him with that of another. He shall not, thereby,

¹ Dig. Lib. 22, tit. 6, l. 7.

be precluded from asserting his own just rights, nor shall he be furnished with an instrument with which to wrest their rights from others. He must use ignorance as a shield only, never as a sword.

And it lies on the party aggrieved to make out his case. Should he be unable to do this, it is his misfortune and he must bear it. But when he can show satisfactorily, that he has improvidently, through mere misapprehension, and without any moral delinquency on his part, done some act in derogation of his own undoubted rights, where it can be done without prejudice to the rights of others, we do believe the cause of justice demands, that he should be reinstated in his former condition. And, we think, sound policy, and a regard for good morals, require, that the rule of law should be so. To say nothing of the essential injustice of allowing one man to obtain and hold what really belongs to another, the doctrine that there is no remedy against mistakes of law offers facilities to the crafty and designing, to practise with impunity upon the honest and unsuspecting. The argument, drawn from the danger of deception, we think, applies far more forcibly in favor of granting relief, than of withholding it. The danger is not all on one side,—certainly not all on one side of the party, who seeks to be relieved on the ground of mistake. In that case, the burden of proof is on him; he must furnish satisfactory, affirmative evidence, to support his case, which he is not very likely to be able to do, unless there actually was a mistake; though he may often fail of proving the mistake, where one really existed. But the party who, it may be, has artfully drawn him into the error, has only to lie quietly by, until, if perchance it can be done, the other has made out his case. At best, therefore, the party who alleges a mistake, stands on but unequal terms with his adversary, but how much is the disparity increased, if, when he has been once ensnared, he is absolutely sure prey, unless, by the veriest possibility, he

should succeed in fixing upon the other the charge of imposition. By denying to the injured or the unfortunate party the privilege of shielding his own rights, the law would virtually countenance fraud, if only it were perpetrated so secretly and adroitly that it could not be proved.

The conclusion to which we come then is, that the distinction between mistakes of law and mistakes of fact rests on no satisfactory foundation, but that the former, as well as the latter, may afford good cause for relief. The artificial presumption, on which the distinction professes to stand, and which is so notoriously contrary to fact, we believe to be justified by no actual necessity. We think the evils that have been apprehended from granting relief, in any case, on the ground of mistake of law, are more imaginary than real; while the practical operation of the opposite doctrine, if that were acted upon, must be, in many instances, to subvert the true ends of justice, and work much positive injury.

That the distinction in question does, however, actually exist, has been argued, from the circumstance, that the subject has been so frequently and elaborately discussed in courts of justice.¹ We think this circumstance proves, rather, that there has been an attempt to set up an artificial distinction, where there is no real difference. The reasons which have been assigned in support of it have either not been appreciated, or else there is nothing in them; certainly they have not produced conviction. If the distinction were really a sound and reasonable one, it would have been acquiesced in and the contest have been given up long ago.

The fact that the attempt to maintain the distinction has been persisted in so long, we attribute to a superstitious reverence, not for the maxim itself, *ignorantia juris non excusat*, but for what we deem a perverted application and

¹ See *Clarke v. Dutcher*, 9 Cow. R. 674.

interpretation of that maxim. It has been cited as authority for refusing to allow a man to recover back money, paid by him under a misapprehension of his legal rights, and in similar cases. The maxim, we submit, has no application whatever, to any such case. *Ex vi termini*, the word *excuse* imports that there is something for which to be excused—some sort of delinquency. To say that ignorance shall be no excuse for a wrong done, a duty neglected, or a right withheld, is intelligible, and meets the force of the language. But to speak of excusing a man for asking to have what, in all honesty, is clearly his, or for declining to do what he is under no obligation, legal or moral, to do, is a plain perversion of language, and is altogether preposterous.

We do not consider the maxim as confined to the case of crimes. It is equally applicable to all cases, in which the rights of others have been invaded. Where one party or the other must suffer loss or inconvenience, it is palpably more just that it should fall on him who has been the cause of the injury, than on him who has had no share in bringing it about. If one man will take it upon him to intermeddle with the rights of another, it is highly reasonable that he should be held obligated to leave them unimpaired.

The sticklers for the maxim, in what they are pleased to consider its broad sense, do, we conceive, put upon it a construction which is really by far too narrow and partial, for both the letter and the spirit of it. The maxim is expressed in the largest and most general terms. Ignorance of the law does not excuse,—or excuses no one. It is not merely, that one's own ignorance shall not excuse himself. The spirit of the maxim we believe to be, that ignorance, be it whosoever it may, shall not be made the occasion or apology for violating the rights of any man. But according to the doctrine sometimes contended for, the ignorance of one man would be made to serve as an occasion and an excuse to another, for getting or retaining what, on every

principle of honesty, belongs to his less keen-sighted neighbor.

In our observations thus far, we have, for the sake of convenience, used the terms ignorance and mistake, indiscriminately. A distinction has, however, sometimes been taken between ignorance of law and mistake of law. The courts of South Carolina¹ have regarded the distinction as a sound and material one. It was adopted by Mr. Senator Paige, in the case of *Champlin v. Laytin*;² while Mr. Justice Bronson, in the same case, thought there was nothing in it. Ignorance, it is said, is passive and does not presume to reason, and its presence is incapable of proof; but mistake presumes to know when it does not, and supplies palpable evidence of its existence.³ The advantage that mistake has over ignorance is, then, as we understand it, in point of proof merely. Now, if ignorance of the law is absolutely incapable of proof, the question whether it is relievable or not, becomes a mere speculative one, which can never arise in practice; for it is not supposed, that ignorance, any more than mistake, is to be relieved before it has been shown to exist. But if it is meant only to say, that ignorance is much more difficult to be proved than mistake, the only inference to be drawn from such a statement is, that cases of ignorance are likely to be made out much less frequently than those of mistake. The question how such cases are to be disposed of, after they have been fairly established, remains wholly untouched.

But we do not perceive precisely how, in practice, ignorance and mistake are to be separated from each other, and treated as two entirely distinct and disconnected things. It is readily conceded, that ignorance and mistake are not the same thing. One is rather the cause, and the other the con-

¹ *Lawrence v. Beaubien*, 2 Bai. R. 623; *Hopkins v. Mazyck*, 1 Hill, Ch. R. 242.

² 18 Wénd. R. 407.

³ *Lawrence v. Beaubien*, 2 Bai. R. 623.

sequence. But they are very likely to go together, and, we apprehend, a case would seldom actually arise, involving the one without the other also. Mistake almost necessarily presupposes ignorance, and originates in it. A man believes the law to be one thing, when, in truth, it is another. He could never have made the mistake, had he not been ignorant as to what the law really was. So, mere ignorance of the law could scarcely do any one positive harm, unless, when called upon to act, he should mistake the law. For, if without knowing what the law is, he do the things required by the law, he is safe. But if, unawares, he get out of his way, he may be said to have mistaken the law; for though he may never have gone through with a formal course of reasoning on the subject, or even have directed his thoughts particularly to it, yet, for the most part, he acts on a sort of implicit belief that the law is thus or so, and if it is otherwise, he is really and truly under a mistake.

The question as to the effect of mere ignorance of law, may arise in cases of compromise, and, so far as we are able to perceive, that is the only class of cases in which it can arise. There, the parties professedly regard their rights as doubtful, and act on that basis. They cannot be said to have been under a mistake, let the law turn out to be as it may; for they never pretended to know what the law was. But when parties act, either expressly or tacitly, on the undoubted belief that the law is so, when really it is otherwise, that is properly a case of mistake.

Our view of the matter, therefore, is that ignorance is the source in which mistake originates, while mistake, thus caused, is generally the immediate ground on which the claim for relief proceeds; so that a case demanding relief will seldom arise, in which both do not concur.

From what we have said, we would not be understood as advocating the doctrine, that relief should always, and as a matter of course, be granted whenever there has been a mistake

of law. That is not so in respect to mistakes of fact. For instance, if a man, though under a misapprehension as to the facts of a case, has done what he was legally or equitably bound to do, he cannot, on the ground of his mistake, have his act set aside. He has done what it was his duty to do, and, probably, what he intended,—certainly what he ought to have intended to do. Under similar circumstances, the result would be exactly the same, had the mistake been one of law. What we mean to say is, that a mistake in point of law, should never be made to one man an obstacle to his retaining or recovering what is honestly his own, nor to another an instrument for protecting or enforcing an unrighteous advantage.

The true principle we believe to be that which was laid down by Lord Mansfield, in the case of *Bize v. Dickason*;¹ namely, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again. The same principle is applicable in deciding whether one shall be bound or not, by any other act he may have done, under the influence of a mistake as to his rights and duties. On this doctrine we stand secure as upon the rock of eternal justice.

Even Mr. Justice Gibbs, who, we may say, is the only English judge who has undertaken to go into any thing like an elaborate argument in support of the position, that mistakes of law are irremediable, was constrained to do homage to this so just and reasonable doctrine, by suggesting that the case then before him fell within the rule, and that it was not against conscience for the defendant, in that action, to demand and retain the money.² The only case,

¹ 1 T. R. 285.

² *Brisbane v. Dacres*, 5 Taunt. R. 143.

so far as we know, in which the doctrine of lord Mansfield has been expressly controverted, is that of *Clarke v. Dutcher*.^{*} If, asks the judge who delivered the opinion of the court in that case, money paid under a mistake of the law can be recovered back in all cases where the party to whom it is paid, is not in, conscience and equity entitled to it, what is the practical distinction between a mistake in fact and a mistake in law? Precisely, we think, what, in principle, the real difference between the two is, that is, nothing at all. And he seems to regard it as a thing exceedingly to be deprecated, that the inquiry, in every case, should be, whether the party to whom the money has been paid can in equity and conscience retain it. Commend us to such tests. They are an honor to the law and to human nature. And we think this same learned judge pays but a very equivocal compliment to the courts, when he states that the principle on which they refuse to relieve against mistakes in law is one which steers entirely clear of the conscience or equity of the transaction. It is this; that "in judgment of law *there is no mistake*; every man being held, for the wisest reason, to be cognizant of the law. The act, therefore, against which the party seeks relief, is his own *voluntary act*." It is past all controversy, that this same principle simplifies mightily; it solves all matters of error at a single breath.

A question has been sometimes made, whether, so far as the effect of a mistake of law is concerned, there is any distinction between contracts executed and executory. That will depend on the circumstances of each individual case. A man who has done an act which he was in conscience, though not in law, obligated to do, will be bound thereby; whereas, there may be cases of a like kind, in which a mere agreement to do the same act could not, on general

^{*} 9 Cow. R. 674.

principles, be enforced for want of a sufficient legal consideration. But where the act was one which the party was under no obligation, either legal or moral, to perform, there, as the other has no right to demand a performance of the act, it would seem that he could have no right to enjoy the benefit of the act when performed. Thus, if it would be unjust, in a given case, for a man to require of another the payment of money, it would be equally unjust for him to retain the money, if he had got it into his hands. If the property is where it rightfully belongs, there it should be allowed to remain; if it has come into the possession of one who has no right to it, justice no less requires that it should return to its true owner.

Doubtless a party would ordinarily stand a better chance to succeed in resisting the execution of a contract, than in obtaining relief against one that had been fully executed. In the one instance, he acts merely on the defensive; in the other, he has to make out his case affirmatively, and that under some disadvantages. But if he can do it satisfactorily, nevertheless, why should he not be held entitled to relief? In regard to executory contracts, notwithstanding the broad and sweeping language which has sometimes been used, we do not believe there is a court in christendom, that would, at this day, enforce a simple contract founded solely on a clear and admitted mistake of law. Such an agreement has plainly no legal consideration to support it. On that ground of itself, therefore, it is utterly void. And that any court should violate the settled principles of law, for the sake of aiding a man to enforce an unrighteous claim, is a thing not to be supposed.

In order, however, to make out a case for relief, on the ground of mistake, the circumstances must be such, that the parties can be placed substantially *in statu quo*. Accordingly, if one, under the influence of error, has entered into an agreement prejudicial to his own rights, and the

other party, acting on the basis of that agreement and in good faith, has acquired new rights of his own, which would be really and essentially injured by annulling the agreement, we do not see how, at law, any redress could be afforded, nor in equity, unless it were a case in which compensation could be made. It is fit and reasonable, that a man who has, by his own act, put his rights in jeopardy, should hold them in subordination to the rights of others, who have done nothing to subject themselves to loss.

There are, also, certain classes of cases, involving peculiar considerations which render them, in some degree, exceptions to the general doctrine. Such are cases of compromise and of family agreements. In a case which is really one of compromise of a doubted and doubtful right, as we have suggested, there can be no such thing as a mistake, properly so called. Indeed, it may be said, that in such cases the parties have done precisely what they intended to do, which was, to take upon themselves each his chance of gaining or losing by the arrangement, according as the law should prove to be one way or the other. And if they are content so to do, there is no reason why they should not close the controversy by dividing the stake, in such manner as they shall deliberately agree upon. The value of a doubtful right is as fair a subject for a man to exercise his judgment upon, as is any thing else. The sale or purchase of such a right proceeds on the same principle with sales and purchases in general. Men do not always know the exact value of the articles they sell or buy. All they can do is, to decide what, under all the circumstances, they are willing to give or take for a particular thing ; which may be more or less than its real value to them or to some one else, or than its market price, if it has one. Now if two individuals, standing on equal terms, have fairly and deliberately entered into an agreement respecting a right that is really doubtful, there is no more reason why their act

should be set aside, because the right turns out the one way or the other, than there is that a sale of merchandise should be held void, because, presently afterwards, prices rose or fell in the market.

But, in order to render an agreement valid as a compromise, it is necessary that the parties should have been fully apprized of the real character of the rights involved. Accordingly, if in the course of the transaction, they implicitly assume the law, on a given point, to be one thing, when, in truth, it is another, or if they regard rights that are doubtful, as settled, and those that are clear and settled, as doubtful, they mistake the law and the agreement is as liable to be set aside as any other. In the case of *Gibbons v. Caunt*,¹ the master of the rolls, sir Richard Pepper Arden, stated it as unquestionable doctrine, that in a court of equity, parties acting upon their rights, doubts arising as to those rights, will never be held bound unless they act with full knowledge of all the doubts and difficulties that arise. And lord Eldon, in a case of family settlement,² after having stated that the court would go a long way to carry into execution a reasonable agreement entered into by the parties in view of a doubt raised as to their rights, proceeded to say, his "difficulty was that there might be a supposition of right without a doubt upon it, that it would be too much to execute an agreement entered into on such a supposition if unfounded." And in a more recent case,³ the master of the rolls, sir John Leach, said that if a party acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of a compromise, a court of equity will relieve him from the effect of his mistake.

We do not, however, understand the test to be, at all,

¹ 4 Ves. R. 894.

² *Stockley v. Stockley*, 1 Ves. & Bea. R. 23.

³ *Naylor v. Winch*, 1 Sim. & Stu. R. 555.

whether the principle of law be one that is plain, simple and generally known, or otherwise, provided it be one that is constructively settled and certain. It is not easy to perceive why a man should be relieved against a mistake of a plain and simple principle of law, and yet that relief should be denied him where he has mistaken a principle which is confessedly complex and difficult. A mistake in the former case might, with some plausibility, be argued to import negligence, but not so in the latter case. The main thing required is, that the party should have had his attention directed to the real difficulty of the case, and should have acted in contemplation of such difficulty, and that he should not have had his eyes blinded by imaginary doubts and difficulties;—in one word, it is, that he should have acted understandingly. The principle we take to be, and it is an extremely reasonable one, that he should have had an opportunity for the full, fair exercise of his judgment upon the whole matter, and should have intended to take upon himself the risk of passing finally upon it.

Cases of family settlements, so far as they involve the element of compromise, proceed upon the same principle as those we have just been considering. But the decision of them embraces also the material additional consideration of preserving the peace and harmony, and sometimes the honor of families. And, for these reasons, as has been said by lord Eldon, in family arrangements an equity is administered in courts of equity, which is not applied to agreements generally.¹ It is obvious, therefore, that cases of this description, and they are very numerous in the books, are not fairly adducible as authorities in a discussion of the general question, whether or not mistakes of law are relievable.

From this examination of the subject, on principle, the

¹ *Stockley v. Stockley*, 1 Ves. & Bea. R. 23.

result at which we arrive is, that in cases involving no peculiar considerations, where a man has, through mistake as to his rights and duties, done or undertaken to do an act which he was under no obligation, legal or moral, to do, if he can be restored to his former condition without any infringement of the rights of others, it should be done. We may, hereafter, take occasion to inquire how the case stands on the ground of authority. C. M.

[To be continued.]

JURISPRUDENCE.

I.—DIGEST OF ENGLISH CASES.

COMMON LAW.

Selections from 1 Perry & Davison, Parts 2 & 3; 5 Bingham's New Cases, Parts 2 & 3; 4 Meeson & Welsby, Part 4; 7 Dowling's Practice Cases, Part 2; and 8 Car. & Payne, Part 4.

- ARBITRATION.** (*Election of umpire by lot.*) Where an umpire in an arbitration is chosen by lot, the assent of the parties to the umpire chosen does not make the election good, unless they know the manner in which he was chosen, and all the circumstances relating to his election. (3 B. & Ad. 248; 5 B. & Ad. 488; 4 Ad. & E. 945.) *In re Greenwood*, 1 P. & D. 461.
2. (*Setting aside award on extrinsic facts.*) An arbitrator, with the view of enabling one of the litigant parties to make an application to the court, after the publication of his award, stated matters which showed that he had put a mistaken construction on the rule of reference, and had misdecided accordingly. The court received affidavits of these facts, and set aside the award, although on the face of it there was no objection. *Jones v. Corry*, 5 Bing. N. C. 186; 7 D. P. C. 299.
 3. (*Authority of arbitrator.*) To an action commenced on the 27th of June, the defendant pleaded, by way of set-off, a claim against the plaintiff, which was not payable until the 1st August, although the consideration had been received by the plaintiff before her action was commenced. Under a judge's order,

dated July 27th, by consent of both parties, "all matters in difference between the parties, including the claim of the defendant in her set-off in the said action," were referred to arbitration: Held, that the claim made in the set-off was properly entertained by the arbitrator as a matter in difference, although not payable until after the date of the action and the judge's order. *Petch v. Fountain*, 5 Bing. N. C. 442.

ASSUMPSIT. (*Assumpsit or covenant.*) The defendant, lessee of certain premises, granted and assigned them by indenture to the plaintiff; who being distrained upon for rent in arrear to the superior landlord before the assignment, brought assumpsit to recover the money paid under the distress, relying on an express promise by the defendant to repay it: Held, that as covenant would lie on the word grant, assumpsit could not be maintained on any implied contract to indemnify the plaintiff, not founded on a new consideration. (Hutton, 34; Cowp. 128; 2 Str. 1027; 2 T. R. 100; 3 B. & Cr. 789.) *Baker v. Harris*, 1 P. & D. 360.

2. (*Consideration.*) Where a deed of separation between the plaintiff and his wife had been drawn up, but not executed by him: Held, on error, (by Patteson, J., Alderson, B., and Little-dale, J.—Lord Denman, C. J., and Lord Abinger, C. B. dissenting), that the petitioner's executing such deed was a legal consideration for a promise by the defendant to pay certain debts and expenses, for which the plaintiff was solely liable. *Jones v. Waite*, 5 Bing. N. C. 341.

BURGLARY. If a person commit a felony in a house, and break out of it in the night-time, this is burglary, although he were lawfully in the house as a lodger. *Reg. v. Wheeldon*, 8 C. & P. 747.

COVENANT. (*For quiet enjoyment, by what words implied—How restrained.*) The word *demise*, in a lease, implies a covenant for title, and a covenant for quiet enjoyment; but both branches of such implied covenant are restrained by an express covenant for quiet enjoyment. (4 Rep. 80 b; 4 Taunt. 329.) *Line v. Stephenson*, (in error,) 5 Bing. N. C. 183.

DEVISE. (*Operation of word "estate."*) A testator, seized of an estate *pur autre vie* to himself and his heirs, by his will, after bequeathing several legacies to his children (omitting his eldest son), devised as follows :—"Also, I give and devise unto my wife all my money, securities for money, goods, chattels, estate, and effects, of what nature or kind soever, and where-soever the same may be at my death." Held, that the word estate conveyed all the testator's interest in his real property, although the lease creating the estate *pur autre vie* contained a provision against assignment without the license in writing of the lessor, and therefore the effect of a devise of it might be to work a forfeiture. (2 T. R. 659, n.; 1 Cox, 362; 14 East, 370; 5 Madd. 38.) *Doe d. Evans v. Evans*, 1 P. & D. 472.

EASEMENT. A parol license from A to B, to enjoy an easement over A's land, is countermandable at any time whilst it remains executory; and if A conveys the land to another, the license is determined at once, without notice to B of the transfer, and B is liable in trespass if he afterwards enters upon the land. *Wallis v. Harrison*, 4 M. & W. 538.

EMBEZZLEMENT. A, one of several proprietors of a coach, horsed it from Hereford to Worcester, and employed B to drive it when he did not himself drive it; B having all the gratuities whichever drove. It was B's duty, each day when he drove, to tell the bookkeeper at Melvern how much money he had taken; the bookkeeper thereupon entering that sum in a book and on the way-bill, together with what he had himself taken, and then paying over the latter to B, who was to give both sums to A. B gave true accounts to the bookkeeper, who made true entries; but B accounted for smaller sums to A, saying those were all. All the proprietors were interested in the money, but A was the party to receive it, and was accountable to his co-proprietors: Held, that this was embezzlement, and that B was rightly described in the indictment as the servant of A, and the money was properly laid as the money of A. *Reg. v. White*, 8 C. & P. 742.

EVIDENCE. (*Receipt given by one partner.*) In an action by

a partnership firm for a debt, evidence is admissible to show that a receipt given for the debt by one of the plaintiffs was fraudulently given without the knowledge of the others. (1 Campb. 392.) *Farrar v. Hutchinson*, 1 P. & D. 437.

2. (*To vary written instrument.*) A bill of exchange was expressed in figures to be drawn for £245; in words for two hundred pounds, value received; with a stamp applicable to the higher amount: Held, that evidence to show that the words "and forty-five" had been omitted by mistake, was not admissible. (Marius, 32; Beawes, 441; 2 East, Pl. Cr. 951.) *Saunders v. Piper*, 5 Bing. N. C. 425.

EVIDENCE IN CRIMINAL CASES. (*Confession.*) It is the opinion of the judges that any confession is receivable, unless there has been some inducement or threat held out by some person in authority. If a person not in any office or authority hold out to an accused party an inducement to confess, this will not exclude a confession made to that person: but if a person in authority over the prisoner was present at the time of such confession, and expressed no dissent, it is not receivable. *Reg. v. Taylor*, 8 C. & P. 733.

INFANT. (*Liability of.*) Where an infant, living in a style of some pretension, purchased of the plaintiff, in the course of four months, silks to the amount of £35, some of which were delivered in the presence of her mother, and some sent to a fashionable hotel, where she and her mother resided: Held, that the defendant might be liable for the amount, although the plaintiff had omitted to make any inquiries of the mother whether the articles were or were not necessary for the defendant. *Dalton v. Gib*, 5 Bing. N. C. 198. For an inquiry into the circumstances of the infant is not a condition precedent to the right to recover against him, but only has the effect, that the tradesman trusts him at the peril of proving by other means that the articles were necessary. *Brayshaw v. Eaton*, ib. 231.

INSURANCE. (*On freight—Description of interest—Inception of risk.*) The plaintiff, owner of a ship, effected a policy on freight, at and from the Coromandel coast to Bourbon. The

ship put into a port on the Coromandel coast for repairs : the plaintiff purchased a cargo, and had it ready to be sent on board, about seven miles from the port. The ship was lost by an accident in going out of dock.

Held, that the plaintiff's interest in the profit of conveying the cargo was properly described as freight (1 B. & Adol. 45); that, the cargo being ready when the ship was about to leave the dock, the risk had attached (13 East, 331; 1 B. & Adol. 45); and that the loss was a loss within the terms of the policy, which covered perils of the seas, and all other perils, losses, and misfortunes. *Devaux v. J'Anson*, 5 Bing. N. C. 519.

JURY. On a motion for a new trial, the court would not receive an affidavit by the attorney of an admission made to him by one of the jurymen, that the verdict was decided by lot. *Straker v. Graham*, 7 D. P. C. 233.

LANDLORD AND TENANT. A lease for one year, "and so on from year to year until the tenancy hereby created shall be determined as hereinafter mentioned," with a provision that it should be lawful for either party to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be determined by a three months' notice to quit at the end of the first year. (2 Campb. 573; 3 Campb. 510; 1 T. R. 378.) *Doe d. Chadborn v. Green*, 1 P. & D. 454.

LIBEL. (*What matter is libellous—Innuendo.*) The following publication was held to be no libel :—Notice. Any person giving information where any property may be found belonging to G., a prisoner in the king's bench prison, but residing within the rules thereof, at &c., shall receive £5 per cent. on the goods recovered, for their trouble, by applying to &c. : Held also, that the following innuendo, "thereby meaning that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention," was an enlargement of the sense of the alleged libel. *Gompertz v. Levy*, 1 P. & D. 214.

LIMITATIONS, STATUTE OF. (*Merchant's accounts—Payment.*) Accounts not in writing are not accounts excepted by the statute of limitations.

Where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, so as to take out of the statute of limitations the debts due longer than six years. (1 C. M. & R. 252 ; 2 C. M. & R. 45, 723.) But the creditor may at any time apply such payment to the debts due longer than six years. (1 Mer. 572 ; 2 B. & Ald. 39 ; 2 B. & Cr. 65 ; 2 Vern. 606 ; 5 Taunt. 596.) *Mills v. Fowkes*, 5 Bing. N. C. 455.

MASTER AND SERVANT. If a person hired on a yearly service as clerk, to conduct an establishment for his master, set up a claim to be a partner, although in a respectful manner and *bonâ fide*, it is sufficient cause for the master to dismiss him without notice. *Amor v. Fearon*, 1 P. & D. 898.

2. B., by a memorandum of agreement signed by himself only, agreed to work for the plaintiff, a manufacturer of powder flasks, and for no other person whatsoever, from the 17th August, 1833, during twelve months, and so on from twelve months' end to twelve months, and until he should give the plaintiff twelve months' notice in writing to quit : Held, that as this agreement contained nothing binding on the plaintiff, it was *nudum pactum* ; and that, although B. served under the agreement until April, 1836, when he left the service and worked for the defendant, who was shown the agreement in question, and warned that B. was the plaintiff's hired servant ; in an action against the defendant for harboring the plaintiff's servant, it was competent to the defendant to show that the contract of hiring was altogether void. (2 H. Bl. 511 ; 4 Taunt. 876.) *Sykes v. Dixon*, 1 P. & D. 463.

3. To an action for wrongfully discharging the plaintiff from the defendant's service before the expiration of his year of service, it is no answer that the plaintiff obstinately refused to work. *Jacquot v. Bourra*, 7 D. P. C. 348.

MURDER. (*Of legitimate child—Description of child.*) An indictment against a married woman for the murder of her

legitimate child, described it as “ a certain infant male child of tender age, to wit, of the age of six weeks, and not baptized : ” Held insufficient, as it neither stated the name of the child, nor stated it to be to the jurors unknown. *Reg. v. Biss*, 8 C. & P. 773.

PATENT. A patent was taken out in respect of new machinery for preparing flax, and improved machinery for spinning flax. The improvement in spinning consisted in spinning at a shorter reach than had before been practised : but the contraction of the reach was rendered practicable by the maceration of the flax in the new machinery for preparing it ; for spinning machines, varying in the distance of the reach, had been in use before : Held, that the patent was void, although the machinery for preparing the flax was new and useful. (2 H. Bl. 463 ; 4 B. & Ald. 541.) *Kay v. Marshall*, 5 Bing. N. C. 492.

PRINCIPAL AND AGENT. (*Liability of agent to principal.*)

The plaintiff, in Calcutta, wrote to his agent in England to transmit him a sum of money through the defendant's house, to be placed to his credit there. The agent showed his instructions to the defendant, and paid them the money, which they placed in their books to the credit of their correspondents in Calcutta, and sent them a letter of advice to account for it to the plaintiff. Before this letter reached Calcutta, their correspondents failed ; but the defendants had, between the date of the letter and the failure, accepted bills drawn by their correspondents before the receipt of the letter, to an amount exceeding the money paid in on account of the plaintiff : Held, that the money could not be recovered from the defendants, for that they had done all that they were instructed or were bound to do, and the situation in which they stood towards their correspondents had been thereby altered. *M'Carthy v. Colvin*, 1 P. & D. 429.

RAPE. A boy under fourteen years of age cannot in point of law be guilty of an assault with intent to commit a rape : and if he be under that age, no evidence is admissible to show that in point of fact he could commit the offence of rape. *Reg. v. Philips*, 8 C. & P. 736.

STOPPAGE IN TRANSITU. M. purchased lead of the plaintiff at Newcastle, without specifying any place of delivery. After a time, M. desired that it should be forwarded to him in London, and the plaintiff gave M.'s agent at Newcastle an order on his servant for its delivery. The agent indorsed the order to a keelman, who received the lead and put it on board a vessel for London. The vessel arrived in London the 21st June, and the defendants, as wharfingers, undertook the delivery of the lead. On that day M. failed; on the 23d and 24th M. demanded the lead from the captain of the vessel, who refused to deliver it, although the freight was tendered, alleging that the defendants had stopped it on account of the failure of M. On the 28th a letter arrived from the plaintiffs, ordering the stoppage of the lead, which was then on board a lighter of the defendants: Held, that the transitus was not at an end, and that the plaintiff was in time to stop the lead. (3 T. R. 466; 7 T. R. 440; 3 East, 381; 1 M. & W. 20; 2 Bing. N. C. 81.) *Jackson v. Nichol*, 5 Bing. N. C. 508.

VENDOR AND PURCHASER. (*Lien of unpaid vendor of goods.*) The defendants sold the plaintiffs wheat, for which the plaintiffs were to pay by a draft on a London banker, to be remitted on receipt of the invoice and bill of lading. The defendants delivered the wheat to a carrier by water, and sent the bill of lading to the plaintiffs, but retook the wheat and sold it, because the plaintiffs failed to send a draft on a London banker according to their contract: Held, that the plaintiffs could not sue the defendants in trover for the wheat. (4 B. & C. 941.) *Wilmshurst v. Bowker*, 5 Bing. N. C. 541.

WITNESS. (*Competency.*) In case against a broker for negligently delivering goods without payment, the plaintiffs called their servant, whose duty it was to deliver under the orders of the defendant, and who had delivered without such orders: Held, that he was an interested witness, and therefore not competent to prove that the defendant was informed of such delivery in time to stop the goods and prevent loss to the plaintiffs, and that he neglected to do so. (1 Campb. 251; Peake, 117; 8 Taunt. 454.) *Boorman v. Browne*, 1 P. & D. 364.

EQUITY.

Selections from 3 Mylne & Craig, Part 3; 2 Keen, Part 3; 8 Simons, Part 4; and 3 Younge & Collyer, Part 2.

BILL OF EXCHANGE. (*Delivery up of.*) Where a party sues in equity for the delivery up of a bill to which, it appears, he has a good defence at law, it is not sufficient for him to show that such defence at law, as it depends upon testimony, is liable to fail through the death of witnesses, he must also show that the defendant in equity came into possession of the bill in a wrongful manner, or that he is not equitably entitled to recover upon the same. Where the grounds of the legal defence are apparent on the face of the instrument, equity will in no case interfere to have it delivered up. *Jones v. Lane*, Y. & C. 280.

DEMURRER. (*Amended bill.*) A defendant having fully answered the original bill, afterwards demurred to the whole of the amended bill, though the bill as amended did not materially vary the case made by the original bill, and contained many of the statements in it which the defendant had previously answered: Held, in the first place, that the Court might look at the record for the purpose of comparing the two bills with each other and with the answer; and in the second place, it being admitted that the result of the comparison would be as above stated, that the demurrer was overruled by the answer. *Ellice v. Goodson*, M. & C. 653.

DOMICIL. (*Evidence of.*) An inquiry having been directed as to the domicile of a testator who died at Amsterdam in 1696; it appeared that testator, who was a Jew, belonged to the Jewish synagogue of London as well as to that of Amsterdam, and that in the year of his death he had, as appeared from the will, an establishment in London, but that he had previously to his death greatly diminished his contributions to the Jew synagogue of that place, and the amount of legacies in his will was stated in Dutch money, and the provisions of his will were in some respects repugnant to the law of England, but agreeable to the

law and custom of Holland : Held, that he was a domiciled Dutchman at the time of his death. *Bernal v. Bernal*, M. & C. 559, (note).

INSTITUTION OF SUIT. (*Authority of plaintiff—Costs.*)

Where a suit had been instituted without the authority of one of the plaintiffs, and such plaintiff had rights at variance with the other co-plaintiffs : His name was, at his own instance, after replication filed, ordered to be struck out, and his costs of the suit and the application were ordered to be paid by the solicitor who filed the bill. *Tabbemor v. Tabbemor*, Keen, 679.

PARTIES. (*Husband and wife—Misjoinder.*) In a suit to obtain the benefit of a bequest to the separate use of the wife, it is improper to join the husband and wife as co-plaintiffs, but the wife should sue by her next friend, the husband being a defendant. *Owden v. Campbell*, Sim. 551.

PARTNERSHIP. (*Suit against successive firms.*) An action having been brought by A upon a covenant entered into with her in conjunction with two others, who were then her partners in a firm, from which A afterwards retired, a bill was filed, by the defendant at law stating that A, upon her retirement, had assigned all her interest in the partnership business and debts to B, who thereby became and still was a member of the firm, and stating that by various transactions with B and the continuing firm, to some of which A was a party, and by various payments to the new firm, the debt had been extinguished ; and the bill prayed for an injunction to restrain the action, and for an account against the firm in its different states, and also to set aside a sale made for payment of the debt. To this bill a general demurrer was put in, which was allowed, partly on the ground that if it could be proved that A had authorized the new firm to receive the debt, that would be a defence at law, and unless she had done so, the plaintiff had no equity ; partly because the plaintiff had no right to mix up the successive partners with his account against A, though there might be ground for a discovery of the transactions between A and B ; partly because the bill as against the successive partners was for discovery beforehand

of what they might say as witnesses at law. *Jones v. Mawnd*, Y. & C. 347.

PLEADING. (*Demurrer to discovery.*) A bill being filed by a purchaser to set aside a contract for purchase of a secret in trade, which bill inquired into the nature of the alleged secret, of which it denied the existence, the defendant demurred to that part of the discovery sought which related to the nature of the secret: Held, that he ought to have taken the objection by plea, this not being one of those cases in which a demurrer to the discovery alone is allowed. *Carter v. Goetze*, Keen, 581.

2. (*Plea to discovery.*) Where a defendant is desirous of pleading a settled account as a defence to the whole bill, which bill charges that such settled account, if any, was fraudulent and collusive, the proper mode is to plead to the whole relief, and to all the discovery, except that which is made by the answer; and a plea to the whole bill, except such parts as relate to the charges of fraud and collusion, is informal; but the plea being right in substance, the defendant in such case was allowed to amend. *Davies v. Davies*, Keen, 534.

POWER. (*Construction—Extent of.*) A bequest to trustees, in trust for A for life, and after her decease in trust for such persons and for such purposes as she should appoint, and in default of appointment in trust for her children, but if she should have no children, then in trust for the testator's other daughters: Held, to confer upon A a general power of appointment. *Mackinley v. Sison*, Sim. 561.

2. (*Husband and wife.*) A power of appointing personalty to a woman (who was unmarried when the power was created,) held to be well executed by an appointment to the husband, as he thereby took no greater interest than he would if the appointment had been simply to the wife. *Hewitt v. Lord Dacre*, Keen, 622.

3. (*Trust raised from power—Conversion.*) The words, "I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she my said wife shall and may devise and proportion among

my children, as she shall think proper, or as she shall direct by will : Held, to confer a life estate on the widow, with remainder in default of appointment to the children in equal shares.

Held, also, to be a conversion of the real estate (which was in fact not sold by the widow) as between the real and personal representatives of a deceased child. *Grieveson v. Kirsopp*, Keen, 653.

PRINCIPAL AND SURETY. (*Work by contract.*) By a contract for the performance of certain works, it was stipulated that three fourths of the work, as finished, should be paid for every two months, the remaining fourth to be paid for upon completion of the whole. For the purpose it was said of assisting the contractor, more than three fourths of the work done were paid for, without the consent of the sureties for due performance of the contract, (such extra payments exceeding the amount of the penalty in the bond given by the sureties) : Held, that the sureties were thereby discharged of their responsibility for the due performance of the contract. *Calvert v. The London Dock Company*, Keen, 638.

PRODUCTION OF DOCUMENTS. (*Admitted possession, with claim of privilege.*) Where a defendant by his answer admitted possession of documents, but stated that several of them were privileged, as written since the institution of the suit : He was, on a motion for production of documents, allowed to withhold such as he stated by affidavit to have been written after the said time. *Parsons v. Robertson*, Keen, 605.

SOLICITOR AND CLIENT. (*Negligence and mistake.*) Where a solicitor had been guilty of great remissness in the conduct of a suit, and had ultimately, through ignorance of the practice of the court, allowed publication to pass without witnesses being examined on his client's behalf ; on the motion of the latter, publication was enlarged, the solicitor paying the costs of the application. *White v. Hillacre, Y. & C.* 278.

2. (*Privileged communication.*) In a bill filed by insurance company A, against company B, and against their solicitor, to set aside a policy of insurance upon a life effected by the latter

company with the former ; it was stated that B had first made a proposal to another company to insure the same life, and that in consequence of such proposal the actuary of such last-mentioned company had called upon the agent of company B, and showed to him an unfavorable medical report which had been made on the life, on account of which the insurance was refused by the last-mentioned company. At this interview the then solicitor of company B was present, which he admitted in his answer, but refused to state what passed, alleging that he was present as the professional and confidential adviser of company B: Held, that this answer was not sufficient to bring the case within the benefit of the rule as to privileged communications. *Bramwell v. Lucas*, 2 B. & C. 745 ; and *Greenough v. Gaskell*, 1 M. & K. 98, commented on. *Desborough v. Rawlins*, M. & C. 507.

SURETY. (*Release of co-surety.*) Where, for considerations that appeared sufficient to the court, A executed a deed for the purpose of indemnifying B, one of two co-sureties, against any payments he might have to make in respect of the sum for which he was jointly liable ; and B afterwards, without the concurrence of A, released his co-surety : Held, that as A was thereby deprived of the benefit of contribution from the co-surety, the indemnity given to B was restricted to one moiety of the payments which he might have to make as surety. *Hodgson v. Hodgson*, Keen, 704.

TRUSTEES. (*Liability of, after notice.*) Where a party having a claim, which he afterwards established by suit, against the separate estate of a married woman, had given notice to her trustee to retain so much out of the proceeds of the separate estate as would answer his claim ; and the trustee had nevertheless paid over the whole to the married woman, who disputed the validity of the claim : Held, that he was personally liable for the amount which he was required by the notice to retain. *Hodgson v. Hodgson*, Keen, 704.

WILL. (*Construction—Continuance of power.*) Where a power of sale was given to trustees, to be exercised during the con-

tinuance of the trusts of the will, and owing to the omission of the trustees to convey the estates to the *cestui que trusts* at the time appointed by the will, such trusts were still subsisting : Held, that the power expired at the time at which the trusts of the will would have ceased if the directions in the will had been complied with. *Wood v. White*, Keen, 664.

2. (*Construction—Death under twenty-one.*) Words conferring an absolute interest were followed by a limitation over, in the event of any of the legatees dying without issue in the lifetime of the testator or afterwards, and then by a declaration that none of the legatees should be entitled to any bequest until twenty-one : Held, that the limitation over did not take effect except in case of death (without issue) under twenty-one. *Monteith v. Nicholson*, Keen, 719.
3. (*Construction—Executory devise and bequest.*) Testator gave real and personal estate to trustees in trust for his daughter A absolutely, provided that if she should marry and have no children, the lands and money should go to his son B, or if he was dead in the lifetime of A, to his children. B died in the lifetime of A, without children : Held, that as the executory limitation was to have taken effect only for the benefit of B and his children, A's interest on his death became indefeasible. *Jackson v. Noble*, Keen, 597.
4. (*Construction—Substitution.*) Where there was a gift of chattels to two daughters, to be divided between them equally, but if either should die without lawful issue, her share to go to her sister, and one daughter died, without issue, in the testator's lifetime : Held, that the gift over to the survivor took effect. *Mackinnon v. Peach*, Keen, 555.
5. (*Construction—Surplus maintenance.*) Where there was a bequest to an infant of certain shares of a residue, in terms clearly sufficient to carry a vested interest, with a direction that the interest of such shares should be applied to the maintenance and education of the infant till he attained twenty-one, and there was a gift over of "the property bequeathed" in the event of the infant dying under twenty-one, and the infant did die under

that age : Held, that such part of the interest on his share as had not been applied to his maintenance and education belonged to his personal representative. *Barber v. Barber*, 3 M. & C. 688. (See *Macdonald v. Bryce*, 2 Keen, 517, *infra*.)

II.—DIGEST OF AMERICAN CASES.

Selections from 21 Pickering's (Massachusetts) Reports, 3 and 4 Wharton's (Pennsylvania) Reports, and 9 and 10 Vermont Reports.

ACTION. (*When commenced.*) In an action upon a promissory note, it appeared, that the real estate of the defendant was attached before the note was signed, but that it was not intended that the writ should be used for the attachment of personal estate until afterwards; and personal estate was in fact attached after the note was signed. It was held, that the attachment of the real estate must be deemed the commencement of the action; and that, as the plaintiff had then no cause of action, the attachment, as well of the personal as of the real estate, was void. *Swift v. Crocker*, 21 Pick. 241.

2. (*Same.*) Where a writ is filled up provisionally and delivered to an officer with instructions not to serve it until after a certain time or the happening of a certain event, the action will not be deemed to have been commenced until the service of the writ. *Seaver v. Lincoln*, 21 Pick. 267.

ACTION ON THE CASE. (*Duties of master of vessel.*) The master of a vessel is not required by any positive law or general usage, always, in the night-time, to exhibit a light on his vessel while at anchor in a harbor; and whether the omission to exhibit one will amount to negligence, so as to bar a claim for an injury received from another vessel's running foul of her, must depend on the particular circumstances of the case. *Carsley v. White*, 21 Pick. 254.

2. (*Amount of damages.*) In an action on the case against the

defendant for carelessly and negligently setting a fire on his own land whereby the plaintiffs' property on adjoining land was consumed, it is not material whether the proof shows gross negligence or only want of ordinary care, for in either case the plaintiffs would be entitled to recover damages to the amount of the actual loss sustained by them, and no more, in the form of vindictive damages or otherwise. *Barnard v. Poor*, 21 Pick. 378.

ADVERSE POSSESSION. Where P. claimed a life estate in land, and S. claimed the fee adversely to P., and both claimed under the same devise, and P. by deed leased the land to H. while S. was in possession, and afterwards S. conveyed the land by deed to W. subject to P.'s life estate;—Held, that the deed from P. to H. was not void, by reason of S. being in possession, claiming adversely to P. at the time of the execution of P.'s deed to H. and that the assignee of W. could not avoid it. *Hibbard v. Hurlburt*, 10 Vermont, 170.

2. (*Landlord and tenant.*) An assignment of a mortgage, when a third person is in possession of the mortgaged premises, claiming adversely, is not within the statute of 1807, "to prevent fraudulent speculations," &c. *Converse v. Searls*, 10 Vermont, 578.

AGENT. (*Usury.*) Where an agent, authorized to settle a debt due the estate, takes a note to the administrator for the principal sum due, and one to himself for usurious interest, the first note is not void, unless the administrator knew of the usury and assented to it. *Baxter, Adm'r. v. Buck*, 10 Vermont, 548.

ARBITRATION. (*How sum awarded may be recovered.*) If a matter in dispute is submitted by parol to arbitration, and the arbitrators award merely that a sum of money is due from one party to the other, the sum so awarded may be recovered under a count in *indebitatus assumpsit* or a count on an *insimul computassent*, it not being necessary to declare specially on the award. *Bates v. Curtis*, 21 Pick. 247.

ARBITRATION AND AWARD. (*Defective award.*) An award in favor of the plaintiff of a certain sum of money, "or that the

defendant carry out and strictly fulfil his part of the contract," is bad. *Hennes v. Myer*, 4 Wharton, 358.

ASSIGNMENT. (*Where a period is fixed for signing.*) In the case of a general assignment by an insolvent debtor in trust for the benefit of his creditors, purporting to be made by and between the debtor, the trustees, and those of the creditors who shall execute the instrument within a fixed period from its date, and containing a release to the debtor, a creditor who executes the instrument after such period has elapsed, is not a party to it, and his claim is not affected by the release. *Battles v. Fobes*, 21 Pick. 239.

2. (*Of notes secured by mortgage.*) When all the notes, secured by a mortgage, are assigned, the mortgage passes with them, but when a part only are assigned, whether the whole mortgage, or a proportionate part, or any interest therein, is assigned, depends on the real contract and actual agreement of the parties. *Langdon and another v. Keith*, 9 Vermont, 299.

ATTACHMENT. (*Lien of factor.*) A manufacturer of goods put them into the hands of a common carrier, at Providence, to be carried to Boston and left at the tavern where the carrier's wagon usually stopped, and then went to Boston and presented an invoice of the goods to his factor, stating that they were on the way, and obtained an advance upon them. The manufacturer had previously consigned divers goods to the same factor for sale, and had received advances upon them, and his practice was to deliver the goods at the warehouse of the carrier in Providence, and the expenses of transportation were usually paid by the factor. Afterward, and while the goods in question were on the way, they were attached at the suit of a creditor of the manufacturer. It was held, that the factor had no lien, and that the attachment was valid. *Baker v. Fuller*, 21 Pick. 318.

ATTORNEY. (*Responsible personally for money borrowed.*) Where an attorney procures money to be advanced, by a third person, in the prosecution of an action, without attempting to pledge the credit of his client therefor, the attorney alone is

responsible to such third person. *Bell v. Mason*, 10 Vermont, 509.

AVERAGE. A vessel bound to Philadelphia, and having a large sum of specie on board belonging to the defendants, arrived in the bay of the Delaware in the month of December, and after encountering various difficulties, was stranded and ice bound, near Reedy Island, in a situation of imminent peril. The specie was carried over the ice to the shore, and by land to Philadelphia, where it was delivered to the defendants. Some weeks afterwards the vessel reached Philadelphia in safety, with the remainder of the cargo, which had been in whole or in part discharged into lighters, and afterwards reshipped. Held, that the defendants were liable to contribute to the charges and expenses incurred after the landing of the specie, as general average. *Bevan v. Bank of the United States*, 4 Wharton, 361.

2. If a vessel be on a lee shore in a heavy gale, and the captain find it necessary for the preservation of the lives of the crew to run the vessel ashore, and accordingly they slip the anchor and put the vessel before the wind and she strikes the shore and is lost; and it appears that she would have gone ashore at all events, it is not a case of general average. *Meech v. Robinson*, 4 Wharton, 360.

BAILMENT. (*Rights of general owner out of possession.*) If the general owner of chattels part with the possession for a definite term; he cannot sustain trespass or trover for an injury done to the thing, during the continuance of the term. *Swift v. Moseley*, 10 Vermont, 208.

2. (*Same.*) But if the bailee apply the thing to a different use from that for which it was bailed, his interest is determined, and the bailor may sustain trover for the injury, against all concerned in the transaction. For instance, if the hirer of a chattel for a year sell it during the year to one knowing his interest, the owner of the chattel may sustain trover against the purchaser.

B.

BANKS. (*How far liable for note.*) A bank which receives a note for collection, and when it is overdue places it in the hands

of a notary in the usual course, is not liable for the neglect of the notary to give notice to an indorser. *Bellemire v. Bank of the United States*, 4 Wharton, 105.

BANK-CHECK. (*Forged.*) Where a forged check purporting to be drawn by a customer on a bank, where such customer keeps a deposit, is paid at such bank to an innocent holder who paid a valuable consideration for it, and who had no knowledge of the forgery, such bank cannot recover of such holder the amount so paid. *Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Vermont, 141.

2. (*Same.*) If such check is purchased by another bank, in good faith, and is received in the course of business by the drawee, and passed to the credit of the bank that purchased it, and notice of the forgery is not given the bank so purchasing it until two months afterwards—the bank, on which the check purported to have been drawn, thereby makes the loss its own. *Ib.*

3. (*Same.*) In such a case, notice of the forgery should be immediately given, to entitle the drawee to a recovery. *Ib.*

BILL OF EXCHANGE AND PROMISSORY NOTE. (*Guaranty not negotiable.*) Underneath the signature of the payee of a negotiable note indorsed by him in blank, were written the following words signed by the defendant: "I guarantee the payment of semiannual interest on this note as well as the principal." It was held, that such guaranty was not negotiable, in itself, nor made so by being written upon a negotiable instrument; and therefore that no action could be maintained on such guaranty by one who subsequently became the holder of the note. *True v. Fuller*, 21 Pick. 140.

2. (*Surety released by parol.*) A parol declaration by the holder of a promissory note to the surety, after the note has fallen due, that he will exonerate the surety and look to the principal, is a good defence in an action by the holder against the security; and if the relation of the makers is not apparent on the face of the note, parol evidence is admissible to prove that the defendant signed as surety, and that this was known to the holder at the time when he made such declaration. *Harris v. Brooks*, 21 Pick. 195.

3. (*Reasonable time.*) A demand on the maker of a note payable on demand, made on the seventh day from the date, was held to have been made within a reasonable time, to charge the indorser. *Seaver v. Lincoln*, 21 Pick. 267.
4. (*Where drawer has no effects in acceptor's hands.*) The drawer of a bill of exchange, having no effects in the hands of the acceptor from the time when the bill was drawn to the time when it became due, was held liable without proof of demand and notice of non-payment. *Kinsley v. Robinson*, 21 Pick. 327.
5. (*Acceptor competent witness.*) In an action by the indorsee against the drawer of a bill of exchange, the acceptor is a competent witness to prove that he has not had in his hands any funds of the drawer. *Ib.*
6. (*Bank may sue on note payable to cashier.*) Where a promissory note was made payable "to the cashier of the Commercial Bank or his order," and the consideration proceeded from the bank, it was held, that an action on the note might be maintained in the name of the bank as the promisee. *Commercial Bank v. French*, 21 Pick. 486.
7. (*Check on bank.*) A check upon a bank is transferable like a bill of exchange; and the mere circumstance of its being dated on a day after that on which it was taken by the holder, is not sufficient, in an action against him by the holder, to let the drawer into a defence of want of consideration between him and the payee. *Walker v. Geisse*, 4 Wharton, 252.
8. (*Same.*) Nor is it sufficient to let the drawer into such defence that the check was taken by the plaintiff in payment of an antecedent debt. *Ib.*
9. (*Alteration.*) A joint and several promissory note was signed by A., B. and C.; and afterwards A. acknowledged his signature to a witness, who subscribed his name in the presence of A. and of the payee, without stating that he witnessed only the signature of A. In an action against the three makers it was held, that this was not such an alteration of the instrument as to discharge B. and C. *Beary v. Haines*, 4 Wharton, 17.

BOND. (*To indemnify against claims due from partnership.*)

In a breach of the conditions of a probate bond, many things, which will not amount to a legal defence, will reduce the damages. *Probate Court v. Bates and another*, 10 Vermont, 285.

BOOK-ACCOUNT. (*Time of making charge.*)

Where a declaration on book is filed as an offset to a suit pending in a county court, and exceptions are taken to the decision of the county court, accepting the report of the auditor, such decision is an interlocutory judgment, and the exceptions cannot be carried to the supreme court until after a final judgment shall have been rendered in the original action; and if an entry of such exceptions is made in the supreme court it will be treated as a misentry. *Fisk v. Herrick*, 10 Vermont, 67.

BOUNDARY LINE. (*Mistake in.*)

A mutual recognition, by adjoining proprietors, of a wrong line, and their acquiescence in such line, unless accompanied by a continued possession by one or both, for fifteen years, is not conclusive as to their title. *Crowell v. Bebee*, 10 Vermont, 33.

2. (Mode of calculating.)

A grant or exception of a certain number of acres off the west end of a lot in a rectangular form, and the sides being toward the cardinal points, is, in legal intentment, to be divided from the lot by a line parallel with the lot lines. *Rich v. Elliott*, 10 Vermont, 211.

3. (Same.)

Parol evidence is not admissible to contradict such intentment, and show that the parties intended the line to be neither straight nor parallel with the lot lines. *Ib.*

CARRIERS. (*Liability of.*)

The defendant, who was the owner of a line of vessels engaged in transporting goods from Philadelphia to Baltimore, received certain goods belonging to the plaintiff, on board of one of his vessels, and gave a receipt in the following words: "Rec'd on board Hand's Line for Baltimore, via Chesapeake and Delaware Canal, from J. B." (the plaintiff,) "100 slaughter hides on deck, which I promise to deliver to J. D. at Baltimore, the dangers of the navigation, fire, leakage and breakage excepted, he or they paying freight

eight dollars, and portorage \$1,50." The vessel left Philadelphia, and on arriving at the mouth of the canal, the captain was informed that the locks were out of order, and that he could not be allowed to pass through the canal. He then proceeded down the bay, and out to sea, with the intention of going round to Baltimore, but in a gale of wind the vessel struck on a shoal, and with the cargo was totally lost. Evidence was given on the trial that the hides had been purchased by the plaintiff, and there was no evidence of any property in J. D. the consignee: Held, (1st) That this was a contract to carry the goods to Baltimore through the canal. (2d) That the circumstances did not excuse the deviation from that route. (3d) That the clause in the receipt excepting "the dangers of the navigation," did not apply to the case of the canal being impassable by inevitable accident or otherwise. (4th) That the plaintiff was entitled to maintain an action against the carrier for the loss of the goods. (5th) That the value of the goods was the proper measure of damages. *Hand v. Baynes*, 4 Wharton, 204.

CASE. (*Turning into highway trespassing horses.*) A person, finding horses trespassing on his land, may turn them into the highway, and is not liable, though they may be lost in consequence of being so turned into the highway. *Humphrey v. Douglass*, 10 Vermont, 71.

CHANCERY. (*Mistake in regard to title.*) In a contract for the sale of land, if both parties are under mistake in regard to the title of the vendor, which was supposed to be perfect, but proves void, this court will relieve the vendee from the contract. *Hadleche v. Williams*, 10 Vermont, 576.

CONFUSION OF GOODS. (*Consequences of and liabilities from.*) If A intentionally intermingle his own goods with others of the same quality and value belonging to B, but which A supposed to be his own, such intermixture does not divest A of his property in those which did in fact belong to him; and if B, knowing that a part of the goods belong to A, take away the whole, he is responsible to A in trespass, for the value of A's goods; or if he take the goods, without such knowledge,

although not liable in trespass, he may be in assumpsit, if he has sold the goods, or in trover, after a demand and refusal, if he has not sold them. *Ryder v. Hathaway*, 21 Pick. 298.

2. (*Same.*) But if A, in such case, knew that a portion of the goods were not his own, or if he doubted, whether they were or not, and intermingled them in order to mislead B, and prevent him from taking his portion, without danger of taking those of A, then A has, by such fraudulent act, lost his own property, and can have no remedy. *Ib.*

CONSIDERATION. (*Notes given for patent.*) Where, on the purchase of a patent right, notes are given for the consideration, and those notes are paid after the purchaser had full knowledge, or the means of knowledge of all the facts, such payment is voluntary, and there cannot be a recovery back of the sum paid; although the purchaser might have avoided payment of the notes for want of consideration. *Stevens v. Head*, 9 Vermont, 174.

2. (*Of contract to indemnify a surety.*) If one procure another to become his surety, and subsequently procure a third person to sign a promise of indemnity to the first surety, there being no new consideration, and this not being done in consideration of any contract, made at the time of the original contract, the contract of indemnity is void, for want of consideration. *Rix v. Adams and another*, 9 Vermont, 233.

CONTRACTS. (*Joint, to convey land, by persons severally seized.*) The plaintiffs agreed jointly to sell and convey to the defendant all their right, title and interest in three certain lots of ground. In an action for a breach of the contract, it appeared that they were separately seized of the three lots. Held, that this was not a sufficient objection to their recovery in the action. *Britton v. Stanley*, 4 Wharton, 114.

2. (*Parties.*) When G. in pursuance of a contract with S., delivered S. wool to card, and cloth to dress for him, and S. was then or soon after in the employ of T. and did not carry on the business on his own account, and this was generally known; Held, that G. was accountable to T. for the services thus per-

formed by S., and as he had notice, before the services were performed, and before any payments were made therefor, that S. was in the employ of T. he was not justified in making any payments to S. *Tuttle v. Green*, 10 Vermont, 62.

3. (*Time of payment.*) Where a contract is made for the payment of specific articles, such as the payee should select, at a place designated, but no time is fixed for the payment, such articles are payable on demand. *Russell v. Ormsbee*, 10 Vermont, 274.
4. (*Executory and executed.*) A contract executed cannot be dependent upon an executory contract. Hence, where one of two parties executed an assignment, absolute in its terms, of a lease, and at the same time gave a separate writing to surrender the possession on a future day, and the assignee, at the same time, contracted in writing with the assignor, to pay a sum of money on a day before the time of said stipulated surrender, it was held, that on the refusal of the assignor to surrender, according to his contract, the assignee might maintain ejectment for the premises, without having made such payment. *Strong v. Garfield*, 10 Vermont, 497.
5. (*Same.*) Where D. brought a quantity of salts to L. in fulfilment of a written obligation, and after they were weighed and left at the potash of L., a dispute arose whether the contract was or was not for gross freight, and D. refused to have them applied on the contract. and L. refused to receive them in any other way, and indorsed them on the contract; Held, that D. could not maintain an action of debt to recover the value of the salts, thus left with L., as L. refused to receive them, except in payment of the contract. *Durrill v. Lawrence and Lamb*, 10 Vermont, 517.
6. (*Chattel sold to be paid for in services.*) Where a gun was sold to be paid for in sawing; Held, that there could be no recovery, until logs were carried to be sawed, so that the party could fulfil his contract. *Downer v. Frizzle*, 10 Vermont, 541.
7. (*Same.*) Where the defendant had sawed logs for plaintiff on such a contract, in part, and sued the plaintiff and recovered therefor; Held, that this did not entitle the plaintiff to maintain

an action for the gun, without any demand for the sawing, but that he should have resisted the recovery when sued by defendant. *Ib.*

CONVEYANCE. (*Exception in deed.*) Where land was conveyed with all the buildings standing thereon except the brick factory, it was held, that the grantor's title to the land on which the factory stood and the water privilege appurtenant thereto, did not pass by the deed. *Allen v. Scott*, 21 Pick. 25.

2. (*Boundary line—General and particular description.*) Where the line of a lot, mentioned in a deed of conveyance as a boundary of the land conveyed, was not ascertained and known by the parties, and a plan of the land had been taken, which is referred to in the deed as containing a particular description of the land intended to be conveyed, and the description on the plan is clear and unambiguous, referring to monuments, courses and distances which can be ascertained with perfect certainty, and is inconsistent with the boundary line referred to, such particular description will control the words of general description, and the reference to such supposed boundary line will be rejected. *Magoun v. Lapham*, 21 Pick. 135.

3. (*By tenant in common.*) A conveyance by a tenant in common, of his undivided interest in a part only of the land held in common, is invalid. *Blossom v. Brightman*, 21 Pick. 285.

CORONER. (*Service by.*) The service of processes by a coroner being by virtue of a special authority, and not coming within the general duties of that officer, all the facts necessary to give him the power should appear in the writ itself; and a general direction to him is not sufficient. *Carlisle v. Weston*, 21 Pick. 535.

2. (*Defect of service cured by appearance.*) But where a writ was served by a coroner, and though it did not appear affirmatively on its face that he had authority to serve it, yet it did not appear negatively that he had not such authority, it was held, that the defendant, by appearing and pleading to the action, had cured the defect in the service. *Ib.*

CORPORATION. (*Where suit may be brought against.*) An

insurance company having its established place of business in one county of this state, and holding its annual meetings there, may, nevertheless, be sued in any other county in the state, by a citizen of another state. *Allen v. Pacific Ins. Co.* 21 Pick. 257.

2. (*Deed.*) To an "indenture" between a corporation and an individual, the parties "set their hands," and against each signature was a small bit of paper attached by a wafer, without any impression on either indicative of a common seal of a corporation. It was held, that the instrument was the deed, as well of the corporation as of the individual. *Mill Dam Foundry v. Hovey*, 21 Pick. 417.

3. (*Suit against railroad corporations.*) Trespass *vi et armis* will not lie against a railroad corporation, for an injury done to the plaintiff by their locomotive steam-engine, whether such injury be wilful or accidental on the part of the servants of the company, where it does not appear that the particular injury was done by the command or with the assent of the defendants. *Philadelphia, Germantown &c. Rail Road v. Will*, 4 Wharton, 143.

COSTS. (*Where two of three defendants are defaulted.*) In assumpsit against three, two are defaulted at the first term and the third pleads; and at a subsequent term the plaintiff discontinues against the third, and takes judgment against the other two. Held, that the plaintiff can tax costs against the defaulted defendants, only to the time of the default. *Matthews v. Vining*, 21 Pick. 335.

COVENANT. (*In a lease.*) The covenant, arising out of the words "yielding and paying," in a lease, is an implied covenant, and the lessee is not liable on it for rents accruing after an assignment of his term. *Kimpton v. Walker*, 9 Vermont, 191.

2. (*How discharged.*) A sale, by partners, of the partnership effects to a third person, and a subsequent dissolution of the partnership, and an assignment, from one of the partners to the other, of all his interest in the partnership, the assignee taking

all the partnership effects into his own hands, operates as a discharge, by the act of the parties, of a covenant of the assignor previously made with the assignee to pay the debts of the partnership out of the partnership effects. *Austin v. Cummings*, 10 Vermont, 26.

3. (*Controlled by bond.*) A partner purchases of his co-partner, all such co-partner's interest in the company property, and gives a bond to pay all the debts of the company, and to indemnify such co-partner from all damages and costs arising from such company's debts; such bond, to prevent a circuitry of action, operates to control a previous covenant from the obligee to the obligor, to pay the debts of the partnership out of the partnership effects. *Ib.*

DEED. (*Blank left for grantee's name fraudulently filled.*) If a deed which has been executed and acknowledged by the grantor, with a blank for the grantee's name, be surreptitiously and fraudulently taken from the grantor's house, and the blank filled up, no title passes thereby; and a *bona fide* purchaser for a valuable consideration from the person holding the deed, stands in no better situation than such fraudulent holder, especially if the original grantor remain in possession of the property. *Van Amringe v. Morton*, 4 Wharton, 382.

2. (*Containing erasures.*) The plaintiffs had tendered to the defendant deeds executed by themselves which contained erasures. Held, that as the erasures were proved on the trial to have been made before execution, and the fact was so stated on the face of the deeds, this was not a sufficient objection. *Britton v. Stanley*, 4 Wharton, 114.
3. (*Notice of unrecorded.*) One, who takes a conveyance of land from one long out of possession, while another has been in the open visible possession, having an unrecorded deed of the same, will be affected with notice of such deed. *Griswold v. Smith and another*, 10 Vermont, 452.

DEVISE. (*Void provision in.*) A provision in a devise of land, that the land shall not "be subject or liable to conveyance or

attachment," is void. *Blackstone Bank v. Davis*, 21 Pick. 42.

2. (*Contingent remainder.*) A testator, after devising to his wife the use of his real estate, while she remained his widow, proceeded as follows: "Should my wife marry or die, the land then shall be equal divided among my surviving sons, with each son paying sixty dollars to my daughters, to be equal divided among them, as soon as each son may come in possession of said land." It was held, that the remainder given to the sons was contingent until the marriage or death of the widow of the testator; and that upon her death, the estate vested in a son who was then living, to the exclusion of the heirs of another son who died before the widow but after the death of the testator. *Olney v. Hull*, 21 Pick. 311.
3. (*Duty of trustee to account.*) A testator gives the residue of his real and personal estate to his son's children born and to be born, subject to a charge of an annual sum to be paid to the son during his life, and appoints a trustee to manage the property, and "from the rents and profits thereof to appropriate such annual sum towards the support of the son, and the residue to account for with said grandchildren and their guardian, the trust to cease upon the death of the son." Held, that by the true construction of the will, the trustee must account annually with the grandchildren, for the surplus of the income. *Pool v. Ward*, 21 Pick. 398.
4. (*Meaning of use and disposal during life.*) A testatrix, after directing a sale of all her real estate, and the payment of her debts, &c. proceeded thus: "What remains of real and personal estate I give and bequeath, as follows: one half thereof to my daughter M., (who was a married woman,) for her use and disposal during her life, and whatever shall remain at her death I give the same to her two daughters, D. and S., in equal shares; and the other half to the children of my son." It was held, that this was not a bequest to M. merely of the income of one half of such residuary fund during her life; but that she might, in her lifetime, if not alone, at least in conjunction with

her husband, dispose of the principal, either wholly or in part.
Harris v. Knapp, 21 Pick. 412.

ERROR. (*In ejectment by persons claiming as heirs.*) Where, in ejectment by persons claiming as heirs of the person last seized, the defendants pleaded jointly, and defended on the ground of a will, which, if substantiated, defeated the claim of the plaintiffs altogether, and the defendants showed no separate defence or title, nor asked for a separate trial, it was held, that they could not assign for error that the plaintiffs had joined in the action different persons, in possession of different properties, in different situations, and holding under different titles, and that a general verdict and judgment were entered against all the defendants. *Jones v. Hartley*, 3 Wharton, 178.

2. (*Misjoinder.*) A declaration in an action on the case set forth that the plaintiff was possessed of certain shares of stock which he sold to the defendant for a certain price, which the defendant promised to pay; and that he, the plaintiff, was ready, and offered to transfer the stock to the defendant, who refused to accept and pay, &c. Afterwards the plaintiff filed other counts, setting forth that the defendant, as agent, undertook and promised the plaintiff to sell the said stock for him, &c., yet the defendant, not regarding his duty or promise, negligently, &c., conducted himself, so that the plaintiff lost the same, &c.; Held, that if there was a misjoinder, the defendant could only take advantage of it by special demurrer, and that it could not be assigned for error. *Martim v. Stille*, 3 Wharton, 337.

3. (*Comments on testimony.*) It is not error in a judge to tell a jury that a witness was "a very willing witness," and that "very little confidence was to be placed in her testimony:" nor to remark upon the strength or absence of evidence, or to suggest presumptions arising from the relationship and conduct of one of the parties. *Burr v. Sim*, 4 Wharton, 150.

EVIDENCE. (*On complaint for flowing meadow.*) On a complaint for flowing the plaintiff's meadow and thereby rendering it less productive, evidence on the part of the defendant that

other meadows on the same stream had, from natural causes, exhibited the same marks of deterioration, was held to be inadmissible, unless accompanied with proof that such meadows were similar to the plaintiff's meadow. *Standish v. Washburn*, 21 Pick. 287.

2. (*Time of execution of specialty proved by parol.*) Parol evidence is admissible to prove the time at which a specialty is actually executed. *Battels v. Fobes*, 21 Pick. 239.
3. (*Account book of intestate.*) In an action against an administrator, it was held, that a private account-book of the intestate was not admissible on the part of the defendant, to prove payments of money to third persons, they being competent witnesses. *Faunce v. Gray*, 21 Pick. 243.
4. (*Comparison of handwriting.*) Proved specimens of the signature of a party are admissible in evidence for the purpose of showing, by a comparison, that a memorandum not signed by such party is in his handwriting. *Richardson v. Newcomb*, 21 Pick. 315.
5. (*To vary amount appearing due by note.*) Where a note was given to the plaintiff by the defendant for three other notes held by the plaintiff against him, it was held, that a memorandum in the handwriting of the plaintiff, purporting to be a computation of the amount due on three notes, the items of which corresponded with the notes, as regarded dates and amounts, was competent evidence to prove, that in consequence of errors made by the plaintiff in such computation, the note first mentioned being given for the amount appearing to be due by the memorandum, was for a larger amount than was actually due. *Ib.*
6. (*Confessions of accomplice.*) Confessions of an accomplice made in the presence of the defendant and assented to by him are admissible in evidence against him. *Commonwealth v. Call*, 21 Pick. 515.
7. (*Different offences.*) Although evidence of one offence is not admissible for the purpose of proving the charge of another, yet it may be so connected with the proof of a relevant and material fact, that its introduction cannot be avoided. *Ib.*

8. (*Conversations between plaintiff and defendant's agent.*) In assumpsit on a contract alleged to have been made with the plaintiff, a native of France, by an agent of a society, of which the defendants were members, upon which contract the plaintiff came over to this country, to teach the art of making sewing silk, it was held, that a deposition of a third person, stating certain conversations between the said agent and the plaintiff and the deponent, relating to the situation and prospects of the plaintiff, ought to have been admitted in evidence; but the judge having, at the conclusion of other testimony, offered to admit parts of the deposition in evidence, and the counsel for plaintiff not offering the deposition at all in evidence after the offer of the judge, it was held, that he could not assign this for error. *D'Homergue v. Morgan*, 3 Wharton, 26.
9. (*Irrelevant matter.*) A witness cannot be interrogated by the party calling him, as to irrelative matter, although on a previous cross-examination he has been questioned as to such matter and given testimony. *Smith v. Dreer*, 3 Wharton, 154.
10. (*Direct and cross-examination.*) On the trial of an action for work and labor done, in furnishing gas fittings for the defendant's house, a witness produced by the defendant, having given evidence to show that the work was badly done, was asked on his cross-examination whether the plaintiff had not made the gas-fittings at the Exchange, and certain other public places: Held, that the defendant's counsel could not ask the witness whether the gas fittings made by the plaintiff for those places were not so defective as to render it necessary to remove them. *Ib.*
11. (*Record of judgment.*) In ejectment by a purchaser at sheriff's sale, against one claiming by a different title, the record of the judgment under which the land was sold by the sheriff, is admissible in evidence for the plaintiff. *Schall v. Miller*, 3 Wharton, 250.
12. (*Parol evidence.*) In ejectment by a purchaser at a sheriff's sale, where it was proved that the sheriff's deed was lost, and

the levy did not specify distinctly the land levied on, it was held, that parol evidence was admissible to show what land was levied on and sold. *Ib.*

13. In an action of covenant on an agreement, by which the defendants covenanted to raise a certain dam, to a certain number of inches above its then height, and to maintain and keep it at that height, and in good order, casualties excepted, it was held, that evidence was not admissible on the part of the plaintiff, to show the condition of the dam previous to the agreement. *M^cCredy v. Schuylkill Nav. Co.*, 3 Wharton, 424.
14. (*Competency of witness.*) If different persons, either before or after suits brought, agree to divide among themselves the amounts if any, that may be recovered, each of them is liable to the defendant for costs. They cannot, therefore, be made witnesses for one another, by exchanging mutual releases. The costs of suit must be paid before any of them can be examined. *Mackinley v. M^cGregor*, 3 Wharton, 369.
15. (*Same.*) In an action against three joint obligors in a bond, the sheriff returned, that he had summoned one, and "*nihil habent*," as to the others: Held, that one of the obligors not summoned was not a competent witness for the defendant, although the latter paid into court a sum sufficient to cover the principal and interest of the bond, and the costs of suit. *Smith v. Sillyman*, 3 Wharton, 589.
16. (*Same.*) In an action for a breach of a warranty in the sale of goods, it appeared that the sale was made by A as the agent of the defendants, and that after the plaintiff discovered the alleged defects in the sale of the goods, A guaranteed that the goods should prove to be of the first quality, and that he would refund as much as two disinterested persons should certify to be just. An award was made, finding that a certain allowance should be made: Held, that A was nevertheless a competent witness for the defendants. *Jackson v. Wright*, 3 Wharton, 601.
17. (*Want of religious belief.*) The defendant called a witness, to whom the plaintiff objected, on the ground of an alleged want

of religious belief, and the judge admitted the testimony of witnesses in support of and in opposition to the objection, and afterwards the person objected to was examined on his *voir dire*, and having testified to his belief, was admitted to give evidence in chief. Held, that there was no error in this. *Quinn v. Crowell*, 4 Wharton, 334.

18. (*Account in handwriting of deceased intestate.*) In an action brought by the administrator of a deceased grandchild against the administrator of the grandfather, to recover a distributive share of the personal estate of the latter, an account in the handwriting of the deceased parent of the grandchild, is evidence to show the indebtedness of such deceased parent to the grandfather. *Levering v. Rittenhouse*, 4 Wharton, 130.
19. (*Parol declarations in question of advancement.*) Parol declarations of a deceased parent, tending to show that a child had been advanced by him, made in the absence of such child, are not admissible to charge such child, without some evidence *aliunde* of the fact of the receipt of money or other thing by the child. *Ib.*
20. (*Partnership.*) In assumpsit for goods sold, where the defence was, that certain persons not joined with the plaintiff were partners with him, evidence of transactions with the plaintiff, with and on behalf of the alleged partners, and of their acts in relation to their business, was held to be admissible. *Wolle v. Brown*, 4 Wharton, 365.
21. But declarations of one of the alleged partners to the fact of partnership, are not admissible, without distinct and substantial evidence, *aliunde*, of the fact. *Ib.*
22. (*Warranty not provable by parol.*) Where, on the sale of articles of personal property, a bill of sale is given, describing the property sold, and receipting the price, but containing no warranty: Held, that the purchaser could not give parol evidence to prove a warranty. *Reed v. Wood*, 9 Vermont, 285.
23. (*Notice to produce original paper.*) If the opposite party, in whose possession a deed is presumed to be, is out of the state, notice to his counsel, to produce the original, is sufficient to war-

rant the introduction of secondary evidence of its contents. *Mattocks v. Stearns & Wife*, 9 Vermont, 326.

24. (*Usage.*) Evidence of usage is proper to show when goods, landed on a wharf, are to be considered as in the custody of the wharfinger. *Blin v. Mayo & Follett*, 10 Vermont, 56.

25. (*Matters in pais and of law.*) The validity of a sheriff's sale does not depend upon any thing subsequent to the sale, and if the officer makes no return, the sale may be proved by parol. *Gates v. Gaines*, 10 Vermont, 346.

26. (*In support of several counts.*) If testimony be admitted, generally, in support of several counts in a declaration, which is admissible in support of a part only of such counts, it is error, unless the jury are properly instructed upon its application. *Vail v. Strong*, 10 Vermont, 457.

EXECUTION. (*Remedy of debtor committed on.*) If a debtor is committed on a writ of execution, when it ought to have been levied on property, his remedy is by an action against the officer. The commitment is not therefore rendered void. And it seems, that to entitle the debtor to any redress in such a case, he should have been willing to acquiesce in the taking of his property. *Warner v. Stockwell and another*, 9 Vermont, 9.

EXECUTOR AND ADMINISTRATOR. (*Grant of administration by a judge who was interested, void.*) Where the judge of probate had a valid claim against the estate of a deceased person, but had determined in his own mind not to enforce his claim, and exercised jurisdiction over the estate by granting letters of administration, it was held, that he nevertheless was interested as a creditor of the estate, and that the grant of administration was therefore void for want of jurisdiction. *Sigourney v. Sibley*, 21 Pick. 101.

FEME COVERT. (*Money lent to husband.*) A married woman having a separate estate may give or lend the income of it, if at her disposal, to her husband, as to any other person. When it is uncertain whether money received by such husband was intended as a gift or a loan, the jury, in an action against the husband's executors, may take into consideration, among other

circumstances, evidence given to prove that harmony did not always exist between the husband and wife. *Towers v. Hagner*, 3 Wharton, 48.

2. (*Same. Statute of Limitations.*) Where money has been lent by a wife, having a separate estate, to her husband, the statute of limitations does not begin to run against the debt, until the death of the husband. *Ib.*

3. (*Becoming discover.*) If a married woman, having a separate estate, becomes discover, the restraints upon the disposal of estate inconsistent with its general character, which attached during coverture, cease to exist while she is *sui juris*. *Smith v. Starr*, 3 Wharton, 62.

4. (*Cannot execute power to convey lands.*) A feme covert cannot, either separately, or jointly with her husband, execute a valid power of attorney, to convey lands, held in her right. *Sumner v. Conant*, 10 Vermont, 9.

FLOWING LAND. (*Effect of non user.*) A right to flow, derived from grant, is not lost by non user, when it cannot be used without disturbing the right of others, but may be exercised, whenever the right of the others can be extinguished or bought. *Mower and another v. Hutchinson*, 9 Vermont, 242.

FOREIGN ATTACHMENT. (*Money in hands of administrator belonging to wife.*) Money in the hands of an administrator, before a decree of distribution, and where the wife is heir to the estate, is not liable to the process of foreign attachment, at the suit of the creditors of the husband. *Short v. Moore, Trustee*, 10 Vermont, 446.

FRAUDS, STATUTE OF. (*Agreement to construct an article, not within.*) The defendant went to the plaintiff's shop and selected a lining for a carriage. The plaintiff had on hand the body of a carriage nearly finished but not lined, and upon a conversation between them it was understood that the plaintiff was to finish a carriage for the defendant in a fortnight, and the unfinished carriage was completed accordingly, and the defendant had notice thereof and was requested to take it away. It was held, that this was not a contract of sale, but an agree-

ment with a workman to construct an article for his employer, and therefore was not within the statute of frauds and need not be proved by a memorandum in writing. *Mixer v. Howarth*, 21 Pick. 205.

2. (*Delivery.*) The defendant offered the plaintiff a certain price for a steam-engine, a part of the money to be paid when the engine should be taken away by the defendant, which was to be done in two or three weeks, and the balance to be secured by a promissory note. The plaintiff accepted the offer, and said, "then you consider the engine to be yours as it is," and the defendant said "yes." The boiler was set in bricks, in the plaintiff's shop, and could not be removed until they were taken away, and the plaintiff was to take them away, which he did, the next week. The defendant told a witness he had bought the engine, and made inquiries on what terms he could get it carried to another place. The bargain was not in writing, and the defendant did not pay or secure any part of the price, and did not take away the engine. It was held, that there was no delivery and that the sale was therefore void under the statute of frauds. *Dole v. Stimpson*, 21 Pick. 384.

3. (*Promise to pay debt of third person.*) A promise to pay the debt of a third person is a collateral promise, and within the statute of frauds, and must be proved in writing, if the original debtor still remains liable for the debt; but if, by the terms of the contract, the original debtor is discharged, and it remains no longer a debt against him, it is an independent contract, and not within the statute. *Anderson v. Davis*, 9 Vermont, 136.

GUARDIAN. (*Of spendthrift, remedy against.*) If the guardian of a spendthrift, having assets, refuse to pay a debt due from his ward, the creditor has a plain and adequate remedy at law, by an action on the guardianship bond; a bill in equity, therefore, for the recovery of the debt, cannot be sustained. *Conant v. Kendall*, 21 Pick. 36.

HIGHWAY. (*Liability of town for defect in.*) If a road be out of repair, and an injury happen by reason of such want of repair, and the plaintiff or his agents are guilty of no want of care

and prudence, the town is liable, notwithstanding the primary cause of the injury was a failure of a nut or bolt, which was insufficient or improperly fastened. *Hunt and Wife v. Pownal*, 9 Vermont, 411.

INDICTMENT. (*Special verdict.*) In the case of an indictment, a special verdict finding the defendant guilty of the offence, but not finding him guilty in the county where it is alleged to have been committed, cannot be supported. *Commonwealth v. Call*, 21 Pick. 509.

2. (*Same.*) Such a verdict will not operate as an acquittal, but the accused must be again put on his trial. *Ib.*

3. (*Variance.*) Upon an indictment for obtaining money of P. by false pretences, the proof was that the false representation was made to P.'s agent, who communicated it to P. and thereupon, by P.'s direction, paid the money to the defendant out of P.'s funds. It was held that this was not a variance. *Ib.* 515.

INFANT. (*Assignment by.*) One of two partners made a general assignment, in the name of the firm, of all the partnership property, in trust for the payment of the debts of the company, and delivered the property to the assignee. The other partner, who was under age, ratified the assignment, but on coming of age, he brought an action of trespass against the assignee for the alleged unlawful taking and asportation of the property. Held, that trespass would not lie. *Furlong v. Bartlett*, 21 Pick. 401.

INSURANCE. (*Alteration of building insured.*) By an act incorporating an insurance company it is provided, that if any alteration shall be made in any building by the proprietor thereof, after insurance has been made thereon with the company, whereby it may be exposed to greater risk from fire, the insurance shall be void, unless an additional premium and deposit after such alteration, be settled with and paid to the company; but no alterations or repairs not increasing the risk, shall affect the insurance. In an action on a policy under this act, the jury were instructed, that the alteration must have been such that a higher rate of premium would have been demanded to insure

the building in its altered state than before, otherwise the alteration would not be material. It was held, that the instruction was correct; and that in the case of a material alteration it was not necessary, in order to avoid the policy, for the company to show that the loss had been occasioned by the alteration. *Merriam v. Middlesex Mutual Fire Ins. Co.* 21 Pick. 162.

2. (*Evidence in action against insurers.*) Where a survey was called, in a foreign port, upon a vessel which had sustained an injury, and the surveyors recommended a sale, it was held, in an action against the insurers of the vessel, that it was not competent for the insured to prove by the testimony of one of the surveyors, the declarations and opinions of another surveyor while engaged in such survey, it appearing, that the insured had the deposition of such other surveyor in their possession; but that, if this point were less clear, the subsequent introduction of such deposition by them was a waiver of an exception founded on the rejection of such testimony. *Orrock v. Commonwealth Ins. Co.* 21 Pick. 456.
3. (*Same.*) In such case, on the question whether the cost of repairs would exceed half the value of the vessel, evidence tending to show, that she would have been of less value after being repaired than she was before the injury, was held to be inadmissible. *Ib.*
4. (*Abandonment—Sale by master.*) If the injury sustained by a vessel insured is not of such a nature and extent as to warrant an abandonment, it is not such a case of necessity as will warrant a sale by the master. *Ib.*
5. (*Vessel how valued.*) In determining whether the expenses of repairing an injury sustained by a vessel insured under a valued policy, will exceed half of her value, and thus constitute a technical total loss, the valuation of the vessel in the policy is conclusive as to her value. *Ib.*
6. (*Loss, how calculated.*) Where, in such case, the policy provided, that the insured should not have a right to abandon unless the loss exceeded half the amount insured, and the valuation

included the premium, it was held, that the loss must exceed one half of the whole valuation, including the premium, to authorize an abandonment. *Ib.*

7. (*Money raised at marine interest.*) If it is necessary to raise money at marine interest for the purpose of repairing a vessel insured, the rule of deducting one third new for old, is to be applied to such interest, in determining the amount for which the insurers are liable. *Ib.*
8. (*General average.*) The vessel's proportion of items of general average is not to be added to the partial loss, in order to make up the loss of fifty per cent., which authorizes an abandonment. *Ib.*
9. (*Constructive total loss, how estimated.*) In order to constitute a constructive total loss of a vessel insured under a valued policy, there must be a loss exceeding half the amount of the valuation without deducting the premium. *Hall v. Ocean Ins. Co.* 21 Pick. 472.
10. (*Same.*) In making the estimate of the loss in such case, in order to determine whether it exceeds half the amount insured, items which should properly be carried to the account of general average, are not to be included. *Ib.*
11. (*Same.*) So, expenses incurred in order to ascertain the extent of the loss, are not to be included. *Ib.*
12. (*Same.*) So, the wages and provisions of the officers and crew, while the ship is undergoing repairs, are not to be included in such estimates, as part of the particular average. But a reasonable allowance should be made for the custody of the vessel, if necessary, during such repairs, and for superintendence, which allowance should be charged to the account of labor; and from this charge the deduction of one third new for old, is to be made. *Ib.*
13. (*Insurers liable for boat lost.*) The insurers of a ship are liable for the loss of a boat from the stern davits, at sea, unless it is proved that the boat was improperly carried or slung in that situation; it being *prima facie* covered by the policy. *Ib.*
14. (*Evidence of disaster.*) To render an insurer of goods liable

for damage done to them in the course of a voyage, it is necessary that some evidence should be given of such extraordinary disaster or injury in the course of the voyage, as would occasion damage in a seaworthy vessel. *Flemming v. Marine Ins. Co.*, 4 Wharton, 59.

15. (*Policy for whom it may concern.*) Where a policy is for account of whom it may concern, although no express evidence is given on the trial that the person making the insurance had any authority from the owner of the goods to enter into the contract, yet the jury may presume an adoption and ratification of it by such owner, if it be for his benefit. *Ib.*

16. (*Who may bring action.*) Where a policy of insurance is executed, under seal, between the insurer of the one part, and a person named, "as well in his own name, as for and in the name and names of all and every other person and persons to whom the property insured does, may, or shall appertain," of the other part, an action of covenant cannot be maintained upon it in any other name than that of the person who was party to the deed. *De Bollé v. Pennsylvania Ins. Co.* 4 Wharton, 68.

17. (*Who may claim the benefit of.*) No one can claim the benefit of an insurance made by another for account of whom it may concern, without showing that it was the intention of the person obtaining the insurance to embrace his interest in the goods, at the time of the insurance ; but it seems, that to render an insurance available to a party by adoption, it is not necessary that he should have adopted it before the loss happened. *Ib.*

INTESTATE. (*Advancement.*) A debt from a child to a parent, which has been barred by the statute of limitations, cannot be converted by the parent into an advancement, by his declarations to that effect, without the assent of the child. *Levering v. Rittenhouse*, 4 Wharton, 130.

2. (*Same.*) A loan or payment by a father to or for a son, may be considered as a debt and not an advancement, although no security be taken for it. Where money is lent or paid in such case to or for a son, at the request of the latter, and an account is stated by the father and interest charged, such loan or payment is to be considered a debt and not an advancement. *Ib.*

JUDGMENT. (*On demurrer, effect of.*) A judgment on a general demurrer to the declaration, in favor of the defendant, not rendered on the merits, is not a bar to a subsequent suit between the same parties for the same cause of action. *Wilbur v. Gilmore*, 21 Pick. 250.

LANDLORD AND TENANT. (*Waste by tenant at will.*) If a tenant at will commits waste, it is a determination of the will, and trespass *quare clausum fregit* may be maintained against him by the reversioner. *Daniels v. Pond*, 21 Pick. 367.

2. (*Tenant at will not entitled to manure.*) An outgoing tenant at will of a farm, has no right, in the absence of any express stipulation, to remove the manure made on the farm in the ordinary course of husbandry, and consisting of the collections from the stable and barn-yard, or of composts formed by the admixture of these with other substances taken from the farm; and if he sell such manure to be removed, and the vendee have notice of the title of the landlord, the sale vests no property in the vendee, and trespass will lie against him at the suit of the landlord, for taking the manure. But this rule does not apply to manure made in the livery stable, or in any manner not connected with agriculture or in a course of husbandry. *Ib.*

3. (*Tenant keeping possession after expiration of the term.*) Where a tenant remains in possession of the demised premises after the expiration of the term, without any new agreement, the presumption of law is, that he holds the premises subject to all such covenants contained in the original lease, as are applicable to his present situation. *Phillips v. Monges*, 4 Wharton, 226.

LARCENY. (*Shop of person accused of, may be broken by officer.*) Under a warrant in the usual form, on a complaint for larceny, the officer is authorized to break and enter the shop of the person accused, and seize the chattel alleged to have been stolen. *Banks v. Farwell*, 21 Pick. 156.

LEGACY. (*To several.*) A bequest of "one thousand dollars to the children of —," creates an estate or interest, in joint tenancy, with the *jus accrescendi*, and where some of the lega-

tees decease, after the death of the testator, before the recovery of the legacy, the interest vests in the survivors. *Sparhawk and another v. Admr. of Buell and another*, 9 Vermont, 41.

LIBEL. (*Truth, how shown in justification.*) In a suit for libel, if the defendant justify, by showing the truth of the publication, he must plead that specially, particularly specifying those acts of which the plaintiff was guilty, that the court may see whether the defendant was justified in what he published: It is not sufficient in such case, to plead generally, that the words or matters contained in the alleged libel are true. *Torrey v. Field*, 10 Vermont, 353.

2. (*Agreement to do an unlawful act.*) A mere agreement between two, or more, to do an unlawful act, without any act done in furtherance of the common design, is not, ordinarily, an indictable offence. *Id.*

LIEN. (*On demands left with an attorney.*) If an attorney receive a demand for collection, and the debtor leave demands with the same attorney for collection, the avails to be applied on the first demand when realized, this creates no lien on the demands left by the second creditor, in favor of the first creditor, or of the attorney, for the security of the first debt. *Goodrich v. Mott*, 9 Vermont, 395.

LIMITATIONS, STATUTE OF. (*Acknowledgment.*) The maker of a promissory note wrote a letter to the holder, saying, "next week I shall be able to send in to C. T. a statement of my affairs. He will show you the whole of my property and ask for a discharge. I should have done this before, but have been sick and been obliged to work for my board. I have large demands &c. but I cannot collect them and think I never shall." Held, that this letter was not an acknowledgment to take the note out of the statute of limitations. *Bailey v. Crane*, 21 Pick. 323.

2. (*Note given by testator.*) The statute of limitations is a bar to an action on a promissory note, given by a testator in his lifetime, but not due until after his death, if no suit is brought against his executors until more than six years have elapsed

after the debt became due ; and this notwithstanding provisions in the will for the payment of all debts, and for carrying on the testator's business after his death. *Man v. Warner*, 4 Wharton, 455.

3. (*Parol acknowledgment.*) To prevent the running of the statute of limitations, a parol acknowledgment of the adverse title by the person in possession, must be such as to show that he intends to hold the possession no longer adversely, but in future under the party making the claim of right to the land against him, and such as to induce the latter to believe that he will so hold it. Declarations made with a view to a compromise or arrangement of the dispute are not sufficient. *Sailor v. Hertzog*, 4 Wharton, 259.
4. (*Surety paying debt of principal.*) If a surety pays the debt of his principal, after the death of the latter, and when no letters of administration have been taken out upon his estate, the statute of limitations does not begin to run, until letters of administration are taken out. *Levering v. Rittenhouse*, 4 Wharton, 130.
5. (*Set-off.*) A plaintiff may avail himself of the statute of limitations against a set-off given in evidence by the defendant, without pleading the statute in any way. *Ib.*
6. (*Action on the case for deceit.*) In an action on the case for deceit, it is not a sufficient answer to the statute of limitations, that the plaintiff was ignorant of his cause of action, until within six years, although that ignorance was occasioned by the nature of the deceit, or the manner, in which the fraud was perpetrated. *Smith v. Bishop*, 9 Vermont, 110.

MILITIA. (*Defective notice.*) A witness testified that he warned a soldier in the militia to appear at a company muster, by laying down before him, at his dwelling-house, a printed notification, but which was not signed by any person, making at the same time some remark about training, which the witness did not recollect. Held, that the evidence did not prove either a printed or a verbal notice. *Pray v. Curtis*, 21 Pick. 332.

2. (*Same.*) A notification to a soldier in the militia to appear at

a company muster, is insufficient, if it do not express the hour, as well as the day, on which he is required to appear. *Whitmarsh v. Curtis*, 21 Pick. 333.

MORTGAGE. (*Entry for breaking condition to pay several sums.*)

Where the condition of a mortgage was, that the mortgager should pay several sums of money at several times, and upon the non-payment of one of the sums first becoming payable, the mortgagee entered for condition broken, and after all the sums had become payable, the mortgager brought his bill to redeem, it was held, that the mortgager was not entitled to a decree, except upon paying the whole sum due on the mortgage, and not merely the sum for the non-payment of which the entry had been made. *Mann v. Richardson*, 21 Pick. 355.

2. (*Sale with a right to repurchase.*) The sale and conveyance of real estate, in payment of a preëxisting debt, with a simple right of repurchase on the part of the debtor, is valid, and is not a mortgage, even in equity. *Baxter v. Willey*, 9 Vermont, 276.
3. (*Same.*) But, in such contract, it is essential that the debt be extinguished absolutely, *in presenti*. *Ib.*
4. (*Same.*) If the object of the contract be to secure the payment of the debt, and not to extinguish it, except upon the happening of some subsequent event, or the default of the debtor to pay by a given day, the transaction is a mortgage, and no form of words will enable the parties to foreclose the debtor's equity of redemption. *Ib.*
5. (*Void against creditors.*) Where W. sold personal property to J., and took notes, and a mortgage, to secure the payment of the sums, but the property was immediately put into the possession of J., who continued the use and possession thereof: Held, that the mortgage was void as against the creditors of J. *Woodward v. Gates, and another*, 9 Vermont, 358.
6. (*Merger.*) Where an estate is mortgaged, and the mortgagee assigns the mortgage to a third person, and subsequently takes a quit-claim deed from the mortgagor, the mortgage title does not merge in the fee. *Pratt and another v. Bank of Bennington, and another*, 10 Vermont, 293.

7. (*Same.*) In such case the mortgagee becomes mortgagor, and the assignee mortgagee. *Ib.*
8. (*Same.*) There can be no such merger, unless the two estates unite in one and the same person. *Ib.*

NEW TRIAL. (*Irrelevant evidence.*) The admission of irrelevant evidence is not a sufficient ground for setting aside a verdict, where there is no reason to apprehend that it could have had any improper influence upon the jury; but if it had a tendency to prejudice their minds, it may induce the court, in the exercise of their discretion, to grant a new trial. *Ellis v. Short*, 21 Pick. 142.

2. (*Waiver of exception to incompetent juror.*) Where, at the trial of an action against an insurance company, it appeared that the sheriff, who had returned a talesman to serve on the jury, was a stockholder in such company, and this circumstance was known to the junior counsel for the plaintiff soon after the trial began, but no objection was made till after the trial had proceeded for some time, it was held that this was a waiver of any exception to the competency of such juror. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 457.

PARISH. (*Parish records, how recoverable.*) An action of trover or replevin may be maintained in the name of a parish, for the recovery of the parish records. *First Parish in Sudbury v. Stearns*, 21 Pick. 148.

PARTIES. (*Principal and agent.*) In contracts, made by agents, without disclosing the principal, the suit, to enforce them, may be in the name of the principal or agent. *Lapham v. Green*, 9 Vermont, 407.

PARTNER. (*Proof of dormant partnership.*) In assumpsit against T. and B. as copartners in trade in 1836, the plaintiff, in order to prove that T. was a dormant partner of B., produced witnesses to testify that T. made offers to them in 1835, to go into copartnership in their names, and that he stated that he had done business before in the names of other persons, because he owed old debts, for the purpose of keeping his property secure from attachment. Held, that this evidence was relevant and admissible. *Butts v. Tiffany*, 21 Pick. 95.

2. (*Evidence in action by surviving partner against heir of deceased.*) In an action by a surviving partner against the heir of his deceased partner, upon a bond given by the deceased to indemnify the plaintiff against the payment of any sum of money due from the firm, the plaintiff offered in evidence a judgment recovered against him as surviving partner, in an action in which the heir took upon himself the defence. It was held, that the judgment was conclusive against the heir, unless he could show that it had been recovered through the fraud or collusion of the plaintiff; and consequently, that evidence was inadmissible to show on what grounds the judgment had been recovered, or to show that the defence of the statute of limitations had been avoided by an acknowledgment of the debt, made by the plaintiff many years after the dissolution of the partnership. *Valentine v. Farnsworth*, 21 Pick. 176.

PARTNERS AND PARTNERSHIP. (*Surviving partner administrator of deceased.*) A surviving partner, who is also administrator of the deceased partner, cannot submit a matter between the partnership and the estate, because, in such case, he would be acting in the double capacity of a representative and a debtor or creditor of the estate. *Boynston, Adm'r. v. Boynston*, 10 Vermont, 107.

2. (*Agreement to divide gross earnings.*) Where one party furnishes a boat, and the other sails it, an agreement to divide the gross earnings does not constitute a partnership. *Bowman and another v. Bailey*, 10 Vermont, 170.

PARTNERSHIP. (*Joint charter party.*) A charter party entered into between the owners of the ship of the one part, and A and B of the other part, witnessed, that the owners agreed to send the ship on the voyage, and A and B agreed to go as supercargoes, and charter or freight 540 tons of the said ship at a certain price per ton, "that is," A agreed to freight 375 tons, and B agreed to freight 165 tons. The defendant contracted with A for the freight of certain goods for him, which freight was paid by A to the owners: Held, that A and B were not joint contractors or partners, in respect to the freight;

that the action was properly brought by A alone, and that B was a competent witness for him. *Coe v. Cook*, 3 Wharton, 569.

2. (*Notice of dissolution.*) Notice of the dissolution of a partnership, given in a newspaper printed in the city or country where the partnership business is carried on, is of itself notice to all persons who have had no previous dealing with the partnership. *Watkinson v. Bank of Pennsylvania*, 4 Wharton, 482.
3. (*Same.*) But as to persons who have had previous dealing with the partnership, general newspaper notice is not sufficient. It must be shown that actual notice of the dissolution was communicated to the party in some way or other. *Ib.*
4. (*Same.*) Whether there has been such previous dealing or not, is a matter of fact for the jury; and therefore a judge ought not to reject evidence of newspaper notice, but should direct the jury that if the evidence established a previous dealing, then in point of law there should have been actual notice, and that merely taking in the paper was not proof of such actual notice without something further. *Ib.*
5. (*Note by one of three partners.*) One of three partners (the partnership being notorious,) purchases a horse, for which he gives his individual note: The partners are not liable, although the avails of the horse, when sold, go into the partnership fund. *Holmes v. Burton and another*, 9 Vermont, 252.

PATENT-RIGHT. (*Recording.*) A conveyance of a right to use a patent right in a limited territory is not required to be recorded in the patent office. *Stevens v. Head*, 9 Vermont, 174.

2. (*Evidence.*) Where a right to use an invention, secured by patent, is conveyed, and the vendee has not been disturbed in the exercise or use, the vendee must shew that the person conveying has no such right, if he seeks to recover against the vendor, on the ground that no right was conveyed. *Ib.*

POSSESSION. (*Of part of a tract of land.*) If a person enter upon a tract of land, with visible boundaries, under a deed of the entire tract, his occupation and improvement of a part, is

construed as a possession of the whole. Such a possession, is co-extensive with the claim of title. *Crowell v. Beebe*, 10 Vermont, 33.

PRESUMPTION. (*As to death of absent person.*) The presumption of law is, that the life of an absent person of whom nothing is known, expired at the end of seven years from the time that he was last known to be alive. *Bradley v. Bradley*, 4 Wharton, 173.

PROMISSORY NOTES. (*Notice.*) A notice sent through the post-office to the maker of a note, is not such a demand as the law requires, where his residence is supposed to be ascertained. *Stuckert v. Anderson*, 3 Wharton, 116.

2. (*Same.*) Where the notary was informed, on inquiry, that the maker resided in or near a post-town in an adjoining county, it was held, that a demand sent through the post-office was not sufficient to charge the indorser. *Ib.*
3. (*Same.*) Where a note has been discounted by a bank, it seems that it would not be due diligence, if the notary inquired only of the directors and officers of the bank, respecting the residence of the first indorser. *Ib.*
4. (*Question of diligence.*) It is settled, that whether or not due diligence was used in making inquiry for the indorser, is a mixed question of law and fact: The court are to give their opinion on the law to the jury according to the circumstances as they appear; but the jury must decide the fact whether there was due diligence or not. *Ib.*
5. (*Name written on back of.*) Where a person, not a party to a note, signs his name on the back, without any words to express the nature of his undertaking, he is considered as a joint promisor with the other signers, and if any of the other signers are merely sureties, he is considered as a co-surety with them. *Flint v. Day*, 9 Vermont, 345.
6. (*Alteration of note made by two.*) If a promissory note be altered in a material point, by consent of one signer, without the consent of the other signer, it is the note of the first, but not of the other, and, if declared upon as the joint note of both, the

plaintiff may recover against one, and the other recover his costs. *Broughton v. Fullers*, 9 Vermont, 373.

7. (*Judgment on, payable to bearer.*) G. gave a note to W. payable to bearer, and, before he was notified of any transfer thereof, a judgment was rendered against him therefor, as trustee of W. This is a legal defence to an action, afterwards commenced against him by E. as the bearer of said note. *Evarts v. Gove*, 10 Vermont, 161.

8. (*Void as without consideration.*) A being administrator of B, and guardian of C, presented claims in their favor and procured the same to be allowed by the commissioners on the estate of D. A died, and these debts being unpaid, his administrator claimed pay of the executor of D, who, thereupon, gave him his note therefor: Held, that this note was without consideration, and uncollectable. *Sowles v. Sowles*, 10 Vermont, 181.

REAL ACTION. (*How far judgment in former action, evidence.*)

In an action for land, a judgment in a former action in which the parties were reversed, that the then plaintiff was entitled to the land up to a certain line, is not evidence that the present plaintiff was entitled to the land on the other side of the line; as the plaintiff, in each case, must recover upon the strength of his own title and not upon the weakness of his adversary's.

Williams v. Ingell, 21 Pick. 288.

REPLEVIN. In replevin the plea of *non cepit* admits the property to be in the plaintiff, and puts in issue only the taking and detention. Although the taking were rightful, or excusable, the plaintiff will recover if the detention by the defendant were wrongful; and, generally speaking, the property being admitted by the plea to be in the plaintiff, any detention will be wrongful. As to goods delivered to the plaintiff in replevin, and remaining with him, he can only recover damages for the caption and detention. But as to goods eloigned he may, in addition thereto, recover their value in damages. *Mackinley v. M^r Gregor*, 3 Wharton, 369.

2. (*Evidence as to premises being untenable, not admitted.*)

In replevin, evidence that the premises were untenable, for

want of proper and necessary repairs, and that the landlord had promised to have the premises put in proper order, but failed to do so, is not admissible by way of set-off, unless such promise to repair formed part of the consideration for the rent in the lease or original contract. *Phillips v. Monges*, 4 Wharton, 226.

RIVER. (*Meaning of "navigable."*) A creek in a salt marsh, in order to be deemed navigable, must not merely be sufficient to float a small boat at high water, but must be navigable generally and commonly, and not at extraordinary high tides only, to some purpose useful to trade or agriculture. *Rowe v. Granite Bridge Corporation*, 21 Pick. 344.

SLANDER. (*Evidence in action for.*) In an action for words uttered without any allusion to facts, the mention of which would have prevented them from amounting to slander, it is not competent to the defendant to give such facts in evidence in explanation of the words. *Stone v. Clark*, 21 Pick. 51.

2. (*Same.*) Thus, where the defendant accused the plaintiff of taking a false oath on a judicial trial, without any explanatory words, it was held, that it was not competent for him to prove that he meant to impute falsehood only as to immaterial facts, nor to go into evidence of what was testified at the trial in order to show that they were immaterial. *Ib.*

3. (*Same.*) It is not actionable to say of a physician that he is "a two-penny bleeder." *Foster v. Small*, 3 Wharton, 138.

4. (*Proof in support of declaration.*) A declaration in slander charged the defendant with asserting of the plaintiff, "He is not a physician, but a two-penny bleeder."—The words sworn to by one witness were, "If doctor F. is a two-penny physician I am none; I am a regular graduate and no quack."—Another witness swore to the following words, "doctor F. is no regular bred physician; he has no diploma; he kills his patients and bleeds them to death." Held, that the proof did not support the declaration. *Ib.*

5. (*Proof of malice.*) Where words which might otherwise be libellous are contained in a remonstrance which a citizen has a

right to present to a public authority, malice must be proved by the plaintiff; and unless it be proved the action is not maintainable, although the allegations are shown to be false. *Flitcraft v. Jenks*, 3 Wharton, 158.

SURETY. (*Discharged in equity.*) Although a release may have been obtained by a fraud practised upon the obligee by the principal obligor in a bond, yet if the surety were not a party to the fraud, and the obligee suffer several years to elapse without bringing suit, or giving notice to the surety of the fraud practised, during which time the principal becomes insolvent, these circumstances will in equity discharge the surety. *Gordon v. McCarty*, 3 Wharton, 407.

TAX. (*Liability of assessors.*) Assessors of a town, conducting themselves with fidelity and integrity in assessing a tax, in pursuance of a vote duly certified to them, are not responsible in any form of action, for accidentally assessing a person not an inhabitant of the town and not liable to be taxed. *Baker v. Allen*, 21 Pick. 382.

TENANT IN COMMON. (*Sale of personal property held in common, by one owner.*) If personal property held in common, be sold by one of the tenants in common, as if exclusively his own, such sale is a conversion, and the cotenant may maintain trover therefor against him; or he may, in case the purchaser shall also sell and deliver the property as his own, maintain trover against such purchaser for the subsequent conversion. *Weld v. Oliver*, 21 Pick. 559.

2. (*Same—Damages.*) If, in such case, the action be brought against the original purchaser, the measure of damages will be the value of the property at the time of the sale made by him. *Ib.*

TRESPASS ON THE FREEHOLD. (*What acts of ownership give possession.*) An entry upon land, under a deed, claiming title to the same, and cutting and selling timber from time to time, and exercising acts of ownership, is a sufficient possession to maintain an act of trespass *quare clausum fregit* against a stranger. *Sawyer v. Newland*, 9 Vermont, 383.

TRUSTEE ACTION. (*Negotiable note.*) A negotiable promissory note is liable to be taken by a trustee process, as the property of the payee, notwithstanding an assignment of it by him, unless the maker has notice of his assignment. But after it has been once assigned, the rule is different, and it cannot be taken as the property of a subsequent holder, after a *bona fide* assignment by him, although no notice is given to the maker. *Britton v. Preston, Trustee*, 9 Vermont, 257.

TRUSTEE PROCESS. (*Plaintiff's right of interrogating trustee.*) Under the process of foreign attachment, the plaintiff may put interrogatories to the trustee calculated to elicit facts that may tend to charge him, but he has no right to ask questions for the purpose of discrediting his disclosures. Hence he is not entitled to the privilege of a cross-examination; and what the trustee may have told other persons, or said on former occasions, is immaterial and not a proper subject of inquiry. *Crossman v. Crossman and Tr.* 21 Pick. 21.

2. (*Same.*) One summoned under the trustee process is not excused from answering interrogatories, on the ground that they tend to the discovery of fraud on his part, which may render him responsible as trustee out of his own property, provided they do not tend to charge him criminally. *Neally v. Ambrose and Trs.* 21 Pick. 185.

VENDOR AND VENDEE. (*Acceptance of deed in extinguishment of an agreement.*) Although the acceptance of a deed in pursuance of articles of agreement is *prima facie* and generally an extinguishment of the agreement, yet if the vendor fraudulently induce the vendee to accept a deed by making him believe that the whole of the land contracted for is included in the deed, the agreement is not merged, and the vendee may maintain an action upon it. *Lee v. Dean*, 3 Wharton, 316.

2. (*Same.*) And such action may be maintained, although the vendee has paid the full amount of the consideration money to the vendor. *Ib.*
3. (*Same.*) The vendee in such case may maintain an action of assumpsit for the non-performance of the contract, and is not

obliged to bring an action for deceit ; nor would an action of covenant be proper. *Ib.*

WARRANTY. (*Remedy for breach of.*) Upon the sale of a horse with a warranty or representation of soundness, the plaintiff may declare upon a *warrantizando vendidit*, alleging a *scienter* of the falsity of the warranty, and, in such case, he may recover, either upon the express contract, if proved, or, if the *scienter* be proved, he may recover for the deceit. *Vail v. Strong*, 10 Vermont, 457.

WAY. (*Burden of proof in action for injury by defect of.*) In an action against a town for an injury sustained by the overturning of the plaintiff's carriage, on a highway in such town, the burden of proof is on the plaintiff to show, that he was driving with ordinary skill and diligence at the time when the accident happened. *Adams v. Carlisle*, 21 Pick. 146.

WILL. (*Contested from imbecility.*) Where the validity of an alleged will is contested on the grounds of imbecility of mind and undue influence on the testator, it is not error to charge the jury, that " facts and circumstances were the primary evidence on which they must rely, and not the opinion of witnesses as to the soundness or capacity to make a will ; " nor is it error to charge in such case that " the influence exercised in procuring a will which is sufficient to set it aside, must be such as destroys free agency. There must be imprisonment of the body or mind ; and that unless the jury were satisfied that there was such physical force exerted, arising from actual duress, or imprisonment of the body, or such mental force, arising from threats, as prevented free agency, they were not to consider the influence exerted by the testator's daughter as improper, or sufficient to invalidate the will." *Brown v. Molliston*, 3 Wharton, 129.

2. (*Containing two repugnant clauses.*) It is a general rule, that when a will contains two clauses, totally inconsistent and incapable of being reconciled, the latter shall have a preference. *Lewis's Estate*, 3 Wharton, 162.

WITNESS. (*Where interest is balanced.*) The plaintiff sold

goods to A on a credit; A immediately sold them again to the defendant; and the plaintiff brought replevin for them, on the ground that they had been obtained of him through the fraud of A and the defendant. Held, that A's interest in the suit was precisely balanced, and consequently that he was a competent witness for the defendant. *Bucknam v. Goddard*, 21 Pick. 70.

2. (*Competency of judge of probate.*) On an appeal from a decree of a judge of probate respecting the estate of a deceased person, on the ground of his being interested in the estate and therefore ousted of jurisdiction over it, the judge is a competent witness to prove that he is not interested. *Sigourney v. Sibley*, 21 Pick. 101.
3. (*Competency.*) If, by the terms of a contract to pay the debt of a third person, the original debtor is discharged, he is not a competent witness for the plaintiff to prove such contract. *Anderson v. Davis*, 9 Vermont, 136.
4. (*Same.*) Testimony may be given to show that a violent quarrel existed between the party and a witness, introduced against him, without inquiring of the witness, as to the quarrel. *Pierce v. Gilson*, 9 Vermont, 216.
5. (*Attending several days.*) When a witness attends, if he is wanted for a further day, his fees must be tendered each day, for the succeeding day, but it is not necessary that he be each time served with a subpoena. *Mattocks v. Wheaton*, 10 Vermont, 493.
6. (*Release by administrator to heir.*) In an action brought by an administrator to recover a debt due the estate, the heir is not a witness on his releasing his interest in the debt. The administrator, also, should release him from cost. *Baxter, Adm'rz. v. Buck*, 10 Vermont, 548.

III.—MISCELLANEOUS CASES.

In the Court of King's Bench, for the District of Quebec, in vacation, October 24, 1839.

ROBERT GILLESPIE AND OTHERS AGAINST J. B. FORSYTH AND OTHERS.

Where the first mate of a vessel was unable to read and write, and was not a navigator, but was a good seaman, it was held, that the vessel was not thereby rendered unseaworthy.

IN this case, which was tried before Mr. Justice BOWEN and a special jury, the following facts appeared in evidence.

On the 11th of June, 1837, the schooner *Industry*, Cook, master, of the burthen of one hundred and fifty-six tons, sailed from Quebec with a cargo bound to Montego Bay, in the island of Jamaica, having besides the master, a crew of ten men including the mate, and also a supercargo. On the arrival of the schooner at Montego Bay, the supercargo discharged the master for some cause which does not appear, and had his own name indorsed upon the certificate of registry as master; but previous to the sailing of the vessel upon her return voyage to Quebec, the mate, John Dixon, was appointed master by the supercargo, and his name indorsed upon the certificate of registry as master. To supply the place of Dixon, one of the seamen was appointed mate by him. The individual so appointed was fully competent to discharge all the duties of mate depending upon seamanship, but he could not write, and was not what is called a navigator, nor was there any other person on board capable of navigating the vessel excepting the master. The master and supercargo had previously made diligent search and inquiry for a person possessing such qualification, and without success. Several masters of ships testified that although it is desirable that mates of vessels should possess the knowledge of navigation as well as the skill of seamen, yet that it not unfrequently happens that they are without this knowledge, and that it is not essential to the discharge of their duties as mates, which they consider as requiring rather skill

in seamanship than knowledge in navigation. The vessel on her return voyage was wholly lost in the gulf of Florida, in a violent storm which she suffered there, but not from any fault or insufficiency of the mate, nor from any want of skill or knowledge of the master. She had been insured at the Canada Marine Insurance Company for £1200 on a policy made before she left Quebec, for the voyage out and back. On her return cargo there had been insured at the same office £2000 by a policy wherein Dixon, the new master's name, is given, the latter insurance having been effected after the change of master, and after that change was known at Quebec. The insurance as well on the ship as on the cargo is now resisted by the Canada Marine Insurance Company, on the ground that the vessel was not seaworthy at the time of her sailing from Montego Bay, she not having on board a mate of competent qualifications, as is alleged, nor any person capable of taking the command of her in the event of any accident happening to disqualify the master.

The case was conducted by Messrs. *Black* and *Aylwin* for the plaintiffs, and by Messrs. *Gairdner* and *Vaufelson* for the defendants; and the jury were charged as follows, by

Mr. Justice BOWEN.—After the lengthy and patient examination which the case now submitted to your decision and verdict has undergone, this being the third day of the trial, I shall endeavor to condense the observations which it is my duty to make into as small a compass as possible. The case is one of much interest, and perfectly novel in the courts of this country—of much interest, as carried on between parties of such high respectability as the plaintiffs and defendants, and the sum at stake being large; novel, inasmuch as questions relating to marine insurance could not have arisen here before the formation of the Canada Marine Insurance Company, which is but of recent date—and also novel, as involving a question which has not hitherto received a formal decision in any of the British or American courts of judicature. The action is in assumpsit, and brought to recover a sum of £2,000, on a policy of insurance effected with the Canada Marine Insurance Company, by the plaintiffs, on the twenty-third of Sep-

tember, 1837, on goods per the barge *Industry*, Dixon, master, at and from Montego bay, in the island of Jamaica, to the port of Quebec, which vessel was lost in the gulf of Florida. To this demand, the defendants, being advised that the vessel was not seaworthy when she sailed from Montego bay, have pleaded the general issue, and you, gentlemen, have now a case to decide in which much conflicting testimony has been adduced by most highly respectable and intelligent witnesses on both sides. The defendants, however, much to their credit, have shown no disposition to throw obstacles in the way of the plaintiffs; on the contrary they have made ample admissions narrowing down the case chiefly to this inquiry, namely, whether to constitute the vessel seaworthy at the time of her departure from the island of Jamaica, it was or was not necessary that she should have on board a mate competently skilled in the science of navigation, capable in the case of sickness or death of the master, to navigate the vessel in safety to her port of destination. The defendants have been censured for raising this objection, and refusing to pay off the loss. I think the censure not merited, the directors of the company acting for the stockholders, if they were advised and conscientiously believed, considering the nature of the voyage and the very hazardous navigation in the gulf of Florida, that the vessel was not seaworthy, have merely exercised a right common to all, that of having the opinion of a court, and jury of intelligent merchants, upon the particular facts of the case. With these preliminary observations, I shall now proceed to state to you, gentlemen, what I understand to be the law of the case, and I do not hesitate to say, that there is no rule of law, no decision of any of the tribunals of Europe or America to be met with, declaring in terms, that under no circumstances can a vessel proceeding to sea be held seaworthy, unless she have on board at the time of her departure, a second person skilled in navigation. In every case, therefore, that arises, it becomes a mixed question of law and fact, under the peculiar circumstances in which the voyage is undertaken, the size of the vessel, the probable duration of the voyage, and above all, the intricacy and danger of navigation in particular places, whether

the vessel is to be considered seaworthy or not. The definition of a marine insurance is this—a marine policy contains in general, that the underwriters cause the assured to be insured in a certain sum on ship, cargo, freight, or profits, for a certain voyage or time, against the enumerated risks ; for which they confess themselves to have been paid a premium at a certain rate per cent. These are the leading and substantial parts of every policy, and in connection with these are introduced all the provisions, stipulations, conditions, and warranties. The assured is understood, by the act of procuring the policy, to warrant that the vessel is seaworthy and in every respect fit for the voyage or service on which she is employed. This agreement is uniformly a part of the contract, though it is never expressed in the policy. Again, by effecting a policy, whether it be on the ship, freight or cargo,—or the commissions or profits to accrue upon the cargo,—the assured is always understood to warrant that the ship is seaworthy, or that the materials of which the ship is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails and rigging, stores, equipment and outfit, generally are such as to render the ship in every respect fit for the voyage insured. If the ship be not such as the assured is understood, by effecting the policy, to warrant, the condition on which the liability of the underwriter depends is forfeited, though the unseaworthiness arises from some latent defect which the assured could not have prevented or discovered. Lord Redesdale said, “ Unless the assured were bound to take care that the vessel was in every respect seaworthy, the consequence would be to render those chiefly interested much more careless about the condition of the ship, and the lives of those engaged in navigating her.”¹ I shall now state to you, gentlemen, what constitutes seaworthiness, and in the general acceptance of it, the rule is, that a ship must be seaworthy at the time of her setting sail on the voyage insured.² For, to use the words of lord Kenyon, if a ship be not seaworthy or in a proper condition for sailing during a part of the voyage,

¹ 3 Dow's R. 60.² 1 Dow, 344.

nothing which happens afterwards can better her original situation, or restore the underwriter's liability.¹ The case which I am about to cite to you certainly bears some analogy to the present one, more particularly if you should be of opinion that the mate ought to have been acquainted with navigation. The plaintiffs admit it would have been prudent and highly desirable to have had a mate on board the *Industry* so qualified, and they have proved to you that not only Dixon, the master, but Ryan, as supercargo from Quebec to Jamaica, and also the consignees of the cargo, used every diligence to procure a mate at Montego Bay, previous to the sailing of the vessel, but without effect, and that thereupon one of the crew, who was an able and competent seaman, though he could neither read nor write, or take an observation, or work the ship's reckoning, was appointed mate. The case to which I allude, is that of a ship which insured for a voyage from Cuba to Liverpool, the proper complement of the crew for that voyage being ten men, but the master being unable to procure ten men at Cuba, who would engage to go as far as Liverpool, took on board only eight men at Cuba, who were engaged as far as Liverpool, and two who were engaged to go part of the way, namely, as far as the island of Jamaica; it was held the ship was not seaworthy when she sailed from Cuba, and that the circumstance of her having become seaworthy after her leaving Cuba and before the loss, did not entitle the assured to recover. Not only must the hull of the ship be tight, stanch and strong, but the vessel must be properly equipped with sails, so that she may be enabled to keep up with her convoy, and get to her port of destination with reasonable expedition, for a ship ought to be rendered reasonably secure against capture as well as against the other perils which she is likely to encounter.² So the ship must be provided with sufficient ground tackle for the service in which she is engaged; and, therefore, where the best bower anchor and the cable of the small bower anchor were defective, the vessel was held not be seaworthy.³ The vessel must

¹ 7 Tenn. Rep. 709.² 1 Camp. 1.³ 3 Dow's R. 57.

also be provided with a sufficient crew and a captain.¹ On a long voyage there should be some person besides the captain who can take the command, if he be ill.² The case in which this latter dictum of lord Tenterden is to be found, I shall have occasion to refer to presently ; it is the one in which, (for the first time,) such a broad position has been stated—and it may be observed, *en passant*, it is the single opinion of a judge, (highly respectable no doubt,) but given at *nisi prius*, the authority of which, not having undergone discussion *in banco*, may yet be considered questionable. Seaworthiness depends in part upon the capacity of the captain and his skill in his profession. The court was inclined to hold a vessel not to be seaworthy, the captain of which, from ignorance of the coast, mistook Barcelona for Tarragona. Mr. Justice Platt, in giving the opinion of the court said, I consider the contract to be essentially this ; that the assured shall, in good faith, employ a captain of competent skill, and general good character.³ The assured is bound to provide a competent captain, crew and ship, in the first place, but such a captain and crew being once provided, they are as much the agents and representatives of the underwriters as of the assured, in respect to every thing coming within the sphere of their duty in the navigation of the ship ; and though barratry be not covered by the policy, still if losses happen by the enumerated perils, in consequence of the mistakes or negligence of the master and crew, the underwriters have no right to impute the fault to the assured, who, in the outset, provided a competent crew, any more than they can object to a loss that happens in consequence of some insufficiency of the ship, arising after the risk commences, a seaworthy ship having been provided at the outset ; and there are certainly not wanting reasons and a number of decided cases in favor of this position. We have two decisions directly in support of such a doctrine. Lord Tenterden says, in a recent case : “ We are all of opinion that underwriters are responsible for the misconduct and negligence of the captain and crew, but the owner, as a condition precedent is bound to provide

¹ 8 T. R.² 1 Moody and Malkin, 103.³ 14 East, 481.

a crew of competent skill.”¹ So in another case, a ship fastened to the quay, by a rope, fell over on her side, when the tide left her, in consequence of the insufficiency of the rope, and was injured thereby. Mr. Justice Bayley said: “The underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners.”² The contract of insurance properly so called is clearly void, if the ship at the commencement of the voyage be not seaworthy, although the person who has effected the insurance is ignorant of that circumstance.³ And not only must the ship and her furniture be sufficient for the voyage, but she must also be furnished with an adequate number of persons of competent skill and ability to navigate her. And for sailing down rivers, out of harbors, or through roads, &c., where either by usage or the law of the country, a pilot is required, a pilot must be taken on board.⁴ From all that has been said, you cannot fail to perceive, gentlemen, that in every case it is a question of construction bearing upon peculiar circumstances and the nature of the voyage to be performed, and that nowhere is mention to be found that the mate ought to be a navigator. The captain and a competent crew is all that is required. The plaintiffs contend, and a great majority of their witnesses prove, that in their opinion, the barge *Industry* was amply manned and equipped for the voyage from Montego Bay to Quebec; most of them have likewise deposed that they consider it a mere coasting voyage, as the ship need never be out of sight of land for above a day and a half, and that at any time they could make the east coast of Florida and the United States, and that with a fair wind Nova Scotia might be reached in eight days. The defendants, however, contend, and have produced no less respectable witnesses, who depose that the voyage is a most dangerous one, infinitely more so than to cross the Atlantic; indeed one of the plaintiffs’ own witnesses, captain John Walter Douglas, as well as captain Bayfield, of the royal

¹ 7 B. & C. 798. ² 7 B. & C. 219. ³ Abbott, 208.

⁴ 1 Emerigon, 375; Molley, book 2, ch. 2, sec. 7; Roccus, Nos. 59 and 62; Fr. Ord. liv. 2, lit. du Capitaine, art. 8.

navy, and captains Hunter, Maxwell, and Tuzo, have expressed their opinions that for such a voyage, which they designate as highly dangerous, a vessel with but one navigator is not seaworthy. A vast majority of the witnesses, however, swear they think otherwise, and would prefer to have as mate, a skilful seaman who was not a navigator to one who was skilled in navigation but was not an able seaman. The defendants' counsel have cited a passage or two from Bell's commentaries on the law of Scotland, under the title of insurance, to this effect. "The captain and crew must be of sufficient skill and strength for the voyage." And again: "That a deficiency of force in the crew, or of skill in the master, mate, &c. is want of seaworthiness;" by the words want of skill in the master and mate does not necessarily imply, as has been insisted upon, that the mate ought to be a navigator, and Bell, in his note to the latter passage refers to the case of Wedderburn and Bell,¹ which I have now before me, and which I beg leave to read, and from it you will find that no such position is attempted to be maintained. The case upon which the defendants mainly rely for a verdict in their favor is the case before alluded to of Clifford and Hunter,² before lord Tenterden. The case was in assumpsit on a policy of insurance on sugar from the Mauritius to London. The vessel had originally sailed from Madras with a captain, two mates and a full crew of sailors. On their arrival at the Mauritius, the captain was very ill and continued so while there. He set sail, however, on his voyage homeward with the same crew. The next day his illness increased, and feeling himself incompetent to the charge of the vessel, he inquired of the other officers whether they could manage the voyage to England, but found no one capable to undertake it. He, therefore, put back towards the Mauritius to get some other officer, and on his way thither the ship was lost by perils of the sea. The attorney-general for the defendant said: "The return towards the Mauritius is a deviation, and avoids the policy, unless it were necessary under the circumstances. But the only circumstance to render it necessary was, that the captain being ill

¹ 1 Camp. 1.² M. & M. 103.

there was no person to supply his place, that is, there was an insufficient crew. The ship, therefore, put back, not on account of any accidental distress, but of an original incompetence for the voyage." Lord Tenterden, chief justice, said: "I think it is rather a question for the jury, whether the ship was competent for the voyage, than for me. A ship certainly is not fit for a voyage, unless she sails with a competent crew, a crew competent for the voyage, considering its length, and the circumstances under which it was undertaken. Do you think, considering the length of the voyage from Mauritius to England, that a ship can be sufficiently manned when in the event of any accident to the captain, there is no one else on board able to perform his duty? If not, the defendant must have a verdict." The jury, which was special, found for the defendant. In the case as now submitted to you, gentlemen, if you are of opinion under all the circumstances of the case, that the barge *Industry* was seaworthy at the time she set sail from Montego Bay for the port of Quebec, you will necessarily find a verdict for the plaintiffs for the entire sum demanded. On the other hand, if you find that the vessel was not seaworthy, you will find for the defendants; and I beg you to lay out of consideration altogether, as to whether in the event of a verdict for the defendants, the plaintiffs have any recourse against the owners of the *Industry*, as their solvency or otherwise cannot be judicially known to the court or jury. Gentlemen, the case is in your hands, and I doubt not with persons of your experience, a correct result will be arrived at.

Here the judge offered to read over the great mass of evidence which had been adduced, but the jury declared it was unnecessary.

The jury then retired, and after an absence of five minutes, returned into court with a verdict for the plaintiffs, £2,000, with interest from the service of process.

The above case having been also laid before chancellor Kent, of New York, and Sir John Campbell, attorney general of England, those gentlemen gave the following opinions thereon.

OPINION OF CHANCELLOR KENT.

I have examined and considered the annexed case submitted to me for my opinion. Both the vessel and return cargo were lost by a peril of the sea on the return voyage, and the assured claim a total loss on the policies effected at Quebec on the vessel and cargo.

I am of opinion that the claim is well founded; the defence set up is a breach of the implied warranty of seaworthiness, inasmuch as the mate of the vessel on return voyage was not a person of scientific skill in navigation. The master on the outward voyage was discharged by the supercargo at Montego Bay where the outward voyage terminated. It was the undoubted right of the owner, (and the supercargo was here his representative) to change the master in his discretion, without prejudice to the policies, provided it was done in good faith and a substitute of competent skill provided. The supreme court of New York, in *Walden v. Firemen's Insurance Company*,¹ say that the absolute right in such a case is unquestionable. In the case before me the former mate was appointed master for the return voyage, and of his competency to navigate the vessel on her return voyage from Montego Bay to Quebec there does not appear to be a question. One of the seamen was appointed mate instead of Dixon the former mate, promoted to the rank of master, and though that seaman was competent to discharge the duties of mate to which trust he was appointed, he had not the scientific skill in navigation ordinarily requisite for the due discharge of the duties of master.

I do not think that at least in reference to the voyage in question, and under the circumstances of the case, the skill of a master was requisite in the mate, and that the vessel cannot justly or lawfully be deemed unseaworthy for the return voyage by reason of the want of a competent captain, mate, and crew.

The case of *Clifford v. Hunter*,² before lord Tenterden, at *nisi prius*, is the only authority that I am aware of, for the broad

¹ 12 Johnson, R. 128.

² 3 Carr. and Payne, 16.

position that a ship is not seaworthy for a voyage from India to England with no other person on board capable of commanding, but the captain. I apprehend that such a general and unqualified doctrine was not previously to be found in the English, the Continental, or the American law of insurance. The code of insurance law is essentially the same every where, and is a branch of the international law of all maritime nations. Without questioning the high authority of the case so far as the distinguished and admirable character of the judge who pronounced it is concerned, it is to be observed that it was a *nisi prius* decision, very briefly reported, and never discussed *in banco*, and that after all the point was declared to be not a question of law but a question of fact for a jury. This takes away all the stubbornness from the case, and it is liable to be controlled and modified or set aside by circumstances. It was the case of an East India ship coming from Madras in India to Europe, and it has a very feeble application to the present case of a small schooner navigating along the American coast from Jamaica to the St. Lawrence, over a sea alive with the coasting trade, and with light-houses, pilots and harbors in abundance along the whole extent of the continent adjacent to the track of the voyage.

Seaworthiness varies in its standard according to times, places, and circumstances. It has reference to the place and country of the vessel, to the usages of the trade, to the purposes of the voyage, and the character of the vessel. It varies in its degree and character in different voyages and in different parts of the same voyage. The general doctrine in all the books and in all the cases foreign and domestic is, that the vessel to be seaworthy must be tight, stanch and strong, sufficiently equipped, and manned for the particular voyage and conducted by a master of nautical skill. It is the master acting as master, and in him only, that the ordinances and books require the nautical skill and science of a navigator. Not one word is said in any case prior in time to the one above cited about the nautical science of the mate, and yet in long voyages, with large ships, over half the circumference of the globe, it would seem to be prudent to guard against the contingencies of accident, disease and death, and sometimes

hazardous to leave all the nautical science on board, to be confined to one single individual. But such remote contingencies are not perils within the purview of policies of insurance, and to place our American coasting and West India voyages within the discipline of lord Tenterdon's rule would be monstrous. It would destroy a large majority of all the policies effected on that trade within the last thirty years in our American insurance offices and which is generally carried on in small vessels, such as sloops, schooners, brigs, &c. There is not an instance in all the infinite and vexatious discussions in maritime insurance cases in the courts within the United States, in which such a stern construction of the warranty of seaworthiness has been stated or suggested.

Nor do I think that the rule itself is well founded in the principles of insurance law: a ship is competently equipped for a voyage, if she has a master to command her of good character, science and skill, and a sufficient crew of active and experienced seamen. The assured do not undertake that the *mate* shall also be fit to command with the science and accomplishments of the master. They do not undertake by any implied warranty to provide against the unforeseen and uncalculated contingency of the sickness or death of the master, mate, or crew. They might on the principle of the case in Carrington and Payne, be required to have a competent person on board to supply *the mate's* place in case of the happening of such a contingency, and also an extra number of skilful and hardy seamen to supply vacancies among them by sickness or death. Every vessel on such a doctrine would require at least three skilful navigators on board, in order to be competently equipped to supply vacancies. But the assured warrant no such thing. They warrant that there shall be a competent master to act as *master*, and a competent person to act as *mate*, and a sufficient and competent *crew* to navigate the vessel *on the specific voyage*, and they warrant nothing more. In my humble judgment, if the assured have a sound and well equipped vessel, and a competent commander as *master*, and a competent mate as *mate*, and a competent crew as *seamen*, they comply with

the warranty, and all subsequent casualties and calamities on the voyage must be borne by the insurer to the extent that the peril of the voyage are assumed by the contract. This I take to be the principle and spirit of the insurance cases.

In *Buck v. Royal Ex. Ins. Co.*,¹ Bayley, J., declared that the owner of the vessel was bound in the first instance to provide the ship with a competent crew, and if at the time of the loss a competent crew be left in charge of the ship in her then situation (the vessel was in that case frozen up for the winter in the gulf of Finland) it was sufficient, and the occasional absence of some of the sailors was not fatal, as the mate was sufficient to take care of the ship in her then situation.

It would be very strange if the underwriters, who were held liable in that case, should not be held liable in this, for here when the loss happened by a peril of the sea, there was a competent person discharging the duties of master and a competent person discharging the duties of mate, and a competent crew all on board to meet and wrestle with the peril. We have a strong case on the subject in our New York insurance case, *Treadwell v. the Union Ins. Co.*;² in which the policy was on cargo on board the schooner *Lodge* on a voyage from North Carolina to New York, and the "captain at liberty to act as pilot." The vessel sailed from Perquiman river in North Carolina, on the voyage, and was shipwrecked near cape Hatteras: one of the questions in the case was, whether the vessel was unseaworthy from the want of a competent master and crew. When she sailed on the 13th of September, the crew consisted of the "captain and one hand." The master shipped another hand in cape Hatteras channel. It was shewn by proof at the trial that the captain and one sailor were competent for the river and sound navigation, and that "three hands" or persons were competent for the residue of the voyage; the master in that case was not acquainted with the science of navigation. It was shewn by proof that not more than one quarter of the masters of vessels of the size of the schooner *Lodge*, and engaged in that

¹ 2 Barn. & Ald. 73.

² 6 Cowen's R. 270.

trade understood the science of navigation, and that this fact was generally known in New York, and it was proved to the satisfaction of the court and jury upon the trial, that the master was competent for the voyage though he was not a scientific navigator, and his competency as master in reference to the voyage was submitted at the circuit or *nisi prius* court in the city of New York to a jury, and a verdict found for the plaintiff. On motion for a new trial before the supreme court, the question was ably discussed by a first commercial counsel in the city and the verdict sustained.

I presume that there is not any material difference in the usage and customs of commerce between voyages from Quebec and from St. Johns, Boston, or New York, to the southern states, and the West Indies, and back again ; that, generally speaking, a similar spirit of economy and enterprise prevails in the outfits as to the competency of the master and crew in science and numbers. The case before me states that it was testified by several masters of ships not to be an unfrequent case that mates of vessels were without the knowledge of navigation, and that this was not deemed essential to the discharge of their duties as mates. This fact is of decisive moment in the case, and shews that the usages and sense of the mercantile community are the same at Quebec and New York. The schooner *Industry* in the present case was extremely well equipped for a vessel of her tonnage and character ; she had a competent master and mate and a crew of ten men for the return voyage, and to deny the rights of recovery on the ground that the mate did not unite with his competent qualifications as mate the superior qualifications of a master, when he was only called to act as mate and could not act in any higher character, would appear to me to be repugnant to the contract, and to justice.

The original master was discharged by the supercargo at Montego bay, and we are to presume for sufficient cause and certainly in good faith, and the case states that the new master (Dixon) and the supercargo made diligent search and inquiry, but without success, for a new mate competent to navigate ; and the seaman that was taken for that purpose from necessity was fully competent to

act as mate though not as master. When all is done to supply any deficiency in the course of the voyage that due diligence dictates, it is all that is required therein. *Phillips v. Headlam*,¹ the ship was insured from Liverpool to Sierra Leone and at the mouth of that river there was a regular establishment of pilots. The vessel arrived off the harbor at 3 P. M., and hoisted the signal for a pilot; none came, and at 10 o'clock P. M., the captain judged it proper to attempt to enter without one, and the ship took ground and was lost. It was left to the jury to determine whether the master did what a prudent man ought to have done under the circumstances, and a verdict was found for the assured. On the motion for a new trial the king's bench held that the captain, being a person of competent skill, and having used diligence in seeking a pilot and exercising his discretion in good faith, did all that could be required by law, even if he acted erroneously, and the insurer was liable for the loss.

The doctrine of that case is strongly applicable here to the conduct of the supercargo in his selection of the new mate at Montego bay, and I have no doubt that under the circumstances of the case before me the insured in the policies on the vessel and on the cargo are entitled to recover. The construction of the warranty of seaworthiness is understood to be the same on the ship, freight, and cargo.²

OPINION OF SIR JOHN CAMPBELL.

This resolves itself into a question of fact for a jury rather than a question of law. I conjecture that a jury would find the underwriters liable if it should appear that in such a vessel (a schooner of 156 tons,) the master was well qualified to take observations and make nautical calculations, although the mate could not do more than discharge the duties belonging to good seamanship. The vessel could hardly be considered unseaworthy because the contingency of the master being disabled during the voyage was not provided for.

¹ 2 Barn. & Adolph. 380.

² *Taylor v. Sewell*, 3 Marsh, R. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pickering's R. 56.

LEGISLATION.

VIRGINIA. The general Assembly of this state, at its session which commenced Jan. 7, and terminated April 10, 1839, passed two hundred and seventy-eight statutes, one hundred and two of which are of a public and general nature, and fifteen joint resolutions.

Devises to Schools, &c. All devises or bequests of lands, tenements, hereditaments, goods and chattels, stocks and choses in action, hereafter given or made, for the establishment or endowment of any unincorporated school, academy, or college, for the education of free white persons, are declared to be good and valid, provided such devise or bequest be not made to any theological seminary. Chap. 12, §§ 1 & 7.

Absent Debtors. The provisions of law, in regard to the recovery of debts from absconding debtors, are extended to the recovery of debts not exceeding twenty dollars, from non-resident debtors. Chap. 64.

False or Fictitious Names and Firms. No person shall transact any business whatever in the copartnership name and style of himself and any other person, who is not liable for the debts incurred in the course of the business ; and no person shall transact business in his own name, with the addition of the words " agent," or " factor " merely, without adding thereto the name of his principal, and no person shall transact business under his own name, with the addition of the words " and company," or " & Co." unless some actual partner be represented thereby. And if any person shall offend against the provisions of this act, or either of them,

he or she shall be guilty of a misdemeanor, and for each offence shall be punished by a fine, not less than one hundred nor more than one thousand dollars.

All property, debts, stock and choses in action acquired by any person trading or transacting business in his own name, with the addition of the words "agent," "factor," "and company," or "& Co.," and who does not disclose the name of a principal, or partner, liable for the payment of all the debts incurred in the course of his business, shall, as to all creditors of such person, be taken to be his individual property, and liable to his debts, as if it were acquired solely on his own account. Chap. 72, § 1 & 2.

MICHIGAN. The legislature of Michigan, at the regular session thereof for the year 1839, passed one hundred and seventeen statutes, and thirty-five joint resolutions.

Exemption from Execution. Private libraries, (including maps, prints, philosophical apparatus, and cabinet,) not exceeding in value, in the whole, one hundred dollars, and family portraits, are exempted from execution. No. 10.

Boats and Vessels. Every boat or vessel, used in navigating the waters of Michigan, is made liable :

1. For all debts contracted by the master, owner, agent, or consignee thereof, on account of supplies furnished for the use of such boat or vessel ; on account of work done, or services rendered on board of such boat or vessel ; on account of labor done or materials furnished by mechanics, tradesmen and others, in and for the building, repairing, fitting out, furnishing or equipping such boat or vessel.

2. For all sums due for the wharfage or anchorage of such boat or vessel within this state.

3. For all demands or damages accruing from the non-performance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of the boat or vessel, on which such contract is to be performed.

4. For all injuries done to persons or property by such boat or vessel, in all instances where the same is shown to have oc-

curred through the negligence or misconduct of the master or hands thereon employed.

Any person having a demand as aforesaid, may institute a suit against the boat or vessel, instead of the master, owner, or consignee, at his option. No. 43, §§ 1 & 2.

Imprisonment for Debt and Fraudulent Debtors. § 1. No person shall be arrested or imprisoned on any civil process issuing out of any court of law, or justices' court, or on any execution issuing out of any court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract.

§ 2. The preceding section shall not extend to proceedings as for contempt to enforce civil remedies, nor to actions for fines and penalties, or on promises to marry, or for moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment.

§ 3. In all cases where, by the preceding provisions of this act, a defendant cannot be arrested or imprisoned, it shall be lawful for the plaintiff who shall have commenced a suit against such defendant, or shall have obtained a judgment or decree against him in any court of record, or justices' court, to apply to any judge of the court in which suit is brought, or to any justice of the peace, before whom such suit has been commenced, or such judgment has been obtained, or the justice of the peace before whom such proceedings may have been transferred, for a warrant to arrest the defendant in such suit.

§ 4. No such warrant shall issue unless satisfactory evidence be adduced to such officer, by the affidavit of the plaintiff or of some other person or persons, that there is a debt or demand due to the plaintiff from the defendant, and specifying the nature and amount thereof, as near as may be, for which the defendant, according to the provisions of this act, cannot be arrested or imprisoned, and establishing one or more of the following particulars :

1. That the defendant is about to remove any of his property

out of the jurisdiction of the court in which suit is brought, with intent to defraud his creditor or creditors : or

2. That the defendant has property or rights in action, or some interest in any public or corporate stock, money, or evidence of debt, which he unjustly refuses to apply to the payment of such judgment or decree which shall have been rendered against him : or

3. That he has assigned, removed or disposed of or is about to dispose of any of his property, or rights in action, with the intent to defraud his creditor or creditors : or

4. That the defendant fraudulently contracted the debt, or incurred the obligation respecting which suit is brought.

§ 5. Upon such proof being made to the satisfaction of the officer, to whom the application shall be addressed, and upon security being given to the satisfaction of said officer for the costs of said proceedings, by such complainant, the said officer shall issue a warrant in behalf of the people of this state, directed to any sheriff, constable or marshal within the county where such officer shall reside, therein briefly setting forth the complaint, and commanding the officer to whom the same shall be directed, to arrest the person named in such warrant and bring him before such officer without delay ; which warrant shall be accompanied by a copy of all affidavits presented to such officer, upon which the warrant issued, which shall be certified by such officer, and shall be delivered to the defendant at the time of serving the warrant by the officer serving the same.

§ 6. The officer to whom such warrant shall be delivered shall execute the same, by arresting the person named therein and bringing him before the officer issuing such warrant, or in case of his absence or inability, to the nearest justice of the peace or magistrate having jurisdiction in the case, and shall keep him in custody, until he shall be duly discharged, or committed, as hereinafter provided.

§ 7. On the appearance of the person so arrested, before an officer, as provided in the foregoing section, he may controvert any of the facts and circumstances on which such warrant issued,

and may, at his option, verify his allegation by his own affidavit, and in case of his so verifying the same, the complainant may examine such defendant on oath or affirmation, as the case may be, touching any fact or circumstance material to the inquiry, and the answers of the defendant on such examination shall be reduced to writing and subscribed by him, and the officer conducting such inquiry shall also receive such other proof as the parties may offer, either at the time of such first appearance, or at such other times as such hearing shall be adjourned to ; and in case of such adjournment, such officer shall take a recognizance, with or without surety, at his discretion, from the defendant, for his appearance at the adjourned hearing.

§ 8. The justice of the peace or judge conducting such inquiry shall have the same authority to issue subpoenas for witnesses, and shall have the same power to enforce obedience to such subpoenas, and to punish witnesses refusing to testify, which is now conferred by law in civil cases, in the courts respectively, in which such proceeding originated, and witnesses wilfully disobeying such subpoena, shall be liable to the same penalties as are now prescribed by law in civil proceedings in the said respective courts.

§ 9. If such officer is satisfied that the allegations of the complainant are substantiated, and that the defendant has done or is about to do any one of the acts specified in the fourth section of this act, he shall, by a commitment under his hand, direct that such defendant be committed to the jail of the county in which such hearing shall be had, to be there detained until he shall be discharged according to law, and such defendant, shall be committed and detained accordingly.

§ 10. Such commitment shall not be granted if the defendant shall either :

1. Pay the debt or demand claimed, with the costs of the suit and proceedings against him ; or

2. Give security to the satisfaction of the officer before whom the hearing shall be had, that the debt or demand of the plaintiff, with interest, with the costs of the suit and proceedings aforesaid, shall be paid within three months, if the debt or damage shall not

exceed twenty-five dollars; within six months, if such debt or damage shall be more than twenty-five dollars, and not exceeding fifty dollars; within nine months, if such debt or damage shall be more than fifty dollars, and not exceeding seventy-five dollars; within twelve months, if such debt or damage shall be more than seventy-five dollars, and not exceeding one hundred dollars; and within fifteen months, if such debt or damage shall exceed one hundred dollars: or

3. Enter into a bond to the complainant in a penalty not less than twice the amount of the debt or demand claimed, with such surety or sureties as shall be approved by such officer, conditioned that such defendant will, within thirty days, apply for an assignment of all his property and for a discharge, as provided in the fourth chapter of title seventh, part third, of the revised statutes, and diligently prosecute the same until he obtain such discharge: or

4. If such defendant shall give a bond to such plaintiff, in the penalty and with the sureties above prescribed, conditioned that he will not remove any property, which he then has, out of the jurisdiction of the court in which such suit is brought, with the intent to defraud any of his creditors, and that he will not assign or dispose of any such property with such intent, or with a view to give a preference to any creditor for any debt antecedent to such assignment or disposition, until the demand of the plaintiff, with the costs, shall be satisfied, or until the expiration of three months after a final judgment shall be rendered in the suit brought for the recovery of such demand.

§ 11. Any defendant committed as above provided, shall remain in custody in the same manner as other prisoners in criminal process, until a final judgment shall have been rendered in his favor, in the suit prosecuted by the creditor, at whose instance such defendant shall have been committed, or until he shall have assigned his property, and obtained his discharge agreeably to the provisions of either the second, third, or fourth chapters of title seventh, part third of the revised statutes; but such defendant may be discharged by the officer committing him, on such defendant paying the debt or demand claimed, or giving security for the payment

thereof, as provided in the tenth section of this act, or on his executing either of the bonds mentioned in the said section, No. 48.

Corporations. The voluntary dissolution of corporations is authorized, on the application of the directors or other proper officers, made by petition to the court of chancery. The application must set forth the reasons therefor, accompanied by a statement of the following particulars :

1. A full, just and true inventory of all the estate, both real and personal in law and equity of such corporation, and of all the books, vouchers, and securities relating thereto.

2. A full, just and true account of the capital stock of such corporation, specifying the names of the stockholders, their residences, when known, the number of shares belonging to each, the amount paid in upon such shares respectively, and the amount still due thereon.

3. A statement of all incumbrances on the property of such corporation, by judgment, mortgage, pledge or otherwise.

4. A full and true account of all the creditors of such corporation, and of all engagements entered into by such corporation, which may not have been fully satisfied or cancelled, specifying the place of residence of each creditor, and of every person to whom such engagements were made, if known, and if not known, the fact to be so stated ; the sum owing to each creditor, the nature of each debt or demand, and the true cause and consideration of such indebtedness, in each case. No. 56, § 2.

Unclaimed Baggage. The sale of unclaimed baggage and other personal property is regulated by No. 62.

CRITICAL NOTICES.

- 1.—*A full and arranged Digest of the Cases decided in the Supreme, Circuit, and District Courts of the United States, from the organization of the Government of the United States.* By RICHARD PETERS, Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States. 3 vols. Philadelphia, 1839. Thomas, Cowperthwait & Co.

THE first volume of this digest was noticed in our fortieth number (vol. xx, page 453), since which the work has been completed by the publication of the second and third volumes, and we again take the opportunity of expressing our acknowledgments to Mr. Peters, for his valuable labors. The digest, as now brought to its termination, contains the decisions of the courts of the United States, reported in upwards of sixty-five volumes of reports. Those volumes are Cranch's reports, 9 volumes; Wheaton's reports, 12 volumes; Peters's reports, 13 volumes; Gallison's circuit court reports, 2 volumes; Mason's circuit court reports, 5 volumes; Sumner's circuit court reports, 2 volumes; Paine's reports, 1 volume; Cases decided in the supreme and circuit court, in Dallas's reports, 2 volumes; Washington's circuit court reports, 4 volumes; Peters's circuit court reports, 1 volume; Baldwin's circuit court reports, 1 volume; Peters's admiralty decisions, 2 volumes; Gilpin's district court reports, 1 volume; Brockenborough's reports, 2 volumes; Bee's admiralty reports, 1 volume; Burr's trial, 2 volumes; Cases in Day and Cook's reports, 1 volume; Hall's law journal, 4 volumes.

The amount of labor expended upon such a work can only be

estimated by those who have undertaken something of the same kind themselves. The toil of the maker of digests is by no means the mere mechanical drudgery of scissors and paste that it is supposed to be by the unexperienced, but, on the contrary, it tasks severely some of the best faculties of the mind. A man who can make a good abstract of a case, omitting nothing and having nothing superfluous, gives thereby evidence of a good legal understanding. No member of the legal profession need be told of the importance of having in his library the means of ascertaining the decisions of the various courts of the United States, upon the various momentous questions over which they have exclusive or concurrent jurisdiction. Besides the constitutional cases, which though not coming within the range of the common practice of a lawyer, ought to be familiar to every citizen and especially every member of a liberal profession, there are the various expositions of the statutes of the United States, including the important subject of patents, the cases coming under the head of admiralty and maritime law, and the various common law questions arising between citizens of different states, all of which are of frequent application in the course of practice, and none of which a lawyer can safely be ignorant of. But when the practitioner learns that this important information is to be sought in upwards of sixty volumes, which cost over two hundred and fifty dollars, there will be very likely to arise a "conflict" between the "law" of his purse and the "law" of his mind, which will probably wait a long time for adjudication and settlement. Erasmus writes in one of his letters, that when he gets money, he shall first buy Greek books and then clothes. There are many young lawyers who find themselves in the dilemma of this great scholar, called upon to select between law-books and clothes; and to this numerous class Mr. Peters's labors recommend themselves most emphatically. Within the compass of three octavos and at no extravagant price, they can procure an abstract and summary of all the decisions of the various courts of the United States, from their organization to the present time. Nothing has been omitted; indeed, if there be a fault it is of the opposite kind; the redundancy and the

want of compression and compactness, though this can hardly be deemed a defect, at least to those who have not the reports themselves.

The matters found in the books of reports are arranged in the digest under upwards of nine hundred and fifty heads; and on evidence the points in the work amount to eleven hundred and fifty-seven; on insurance, to four hundred and eighty-seven; on bills of exchange and promissory notes, three hundred and thirty-seven; on patents for useful inventions, to one hundred and ninety-four; on prize and admiralty law and admiralty practice, to seven hundred; on lands and land titles, to four hundred and seventy; and on chancery and chancery jurisdiction and practice, to five hundred and forty.

We recommend the book to the profession, as one eminently worthy of their attention. We cannot consider a library, on the most moderate scale, to be complete without it. The typographical execution also deserves great praise.

2.—*The Judicial Chronicle; being a List of the Judges of the Courts of Common Law and Chancery in England and America, and of the contemporary Reports from the earliest period of the reports to the present time.* Published and sold by James Munroe & Co., Washington Street, Boston.

[A notice of Mr. Gibbs's *Judicial Chronicle* has heretofore appeared in our journal (see vol. xi, p. 483), but as we have been informed that a considerable portion of the edition still remains unsold, which we can only account for on the supposition that the profession are not aware of its convenience as a manual of reference, we readily give place to the following notice from a correspondent. Eds.]

The attention of our readers is recalled to this very useful little work, not so much for the purpose of examining its design and contents, which are sufficiently explained by the title, as to recommend it, if possible, to more general notice and use. Its cheap and convenient form, and its accuracy and variety of information, render it a most desirable book of reference for the whole profession, and for the younger practitioners, and students of law,

especially, there is no work of the kind which embraces within a small compass so much valuable matter. They will find numberless *minutiae* here collected and classified, which are indispensable to the finished, or even tolerably read lawyer, but which lie scattered over an immense surface, and without the aid of some such compendium as this, are gathered only after a life of labor. It is accurate, methodical, and thorough, and no library, we think, should be without it.

3.—*An Analysis of the Principles of Equity Pleading.* By D. G. LUBÉ, Esq., of Lincoln's Inn, Barrister at Law. With notes and references to American Cases. By J. D. WHEELER, Counsellor at Law. New York : Gould, Banks & Co. : and by Wm. and A. Gould & Co., Albany, 1840.

This is a work of very modest pretension, but of great merit. The author has done that for equity, which Mr. Stephen, in his masterly work on pleading, has done for the common law. The work is purely elementary, and highly scientific in its character. Its chief characteristic is that it considers the subjects of practice and pleading separately.

The author has executed his task with singular ability and success. We commend his work, most earnestly, to those who are entering upon the study of equity. The notes of Mr. Wheeler add much to the value of the work.

4.—*Digest of the Decisions of the Courts of Common Law and Admiralty in the United States.* By THERON METCALF and JONATHAN C. PERKINS. Vol. I. Boston : Hilliard, Gray & Co. 1840.

We have not space in the present number to notice, as it deserves, this first volume of Messrs. Metcalf and Perkins's long expected digest. It is a royal octavo of seven hundred pages, printed in double columns and fine type. The matter is alphabetically arranged. This volume commences with "*abandonment*," and terminates with "*custom and usage*," and contains one hundred

and fifty titles. The names of the authors (we prefer this term, when speaking of such a work, to that of "compilers") are a sufficient guarantee that their task has been well performed; and the very slight examination, we have been able to give their work, entirely confirms the favorable judgment we should be inclined to form beforehand. We think it not extravagant to say, that this work will be to the United States, what Comyns's Digest has been and is to England.

5.—*Reports of Cases argued and determined in the several Courts of Law and Equity, in England, during the year 1839.* Jurist Edition. Vol. I. New York: Halsted and Voorhies, 1840.

We presume that this volume contains the cases republished from the Jurist, by Messrs. Halsted and Voorhies, in their monthly publication of the same title. We have already expressed our favorable opinion of the reports contained in the work from which this volume is made up; and we need not therefore reiterate it on this occasion. This volume is got up in good style, and contains within a moderate compass the English Cases in law and equity, for the last year. We wish the publishers all the success, which their enterprize deserves; and cannot doubt, that they will find it for their advantage to continue the work.

6.—*A Treatise on the Law of Evidence.* Fifth American from the eighth London edition, with considerable additions. By S. MARCH PHILLIPPS, Esq., and ANDREW AMOS, Esq., Barristers at Law. With notes and references to American Cases. Parts I and II. New York: Halsted & Voorhies, 1839.

Mr. Phillipps's valuable treatise has been long and favorably known to the profession. The present work is not a new edition, however, but an enlargement of the first volume, of that publication, disconnected with the details of particular actions. It is confined to an inquiry into the general principles of the law of evidence, and the rules of evidence, applicable to particular actions, as referred to for example and illustration. We are glad this work has been republished in this country. We should say more of it, if we had room.

INTELLIGENCE AND MISCELLANY.

The late Andrew Stuart, Esq. We extract from the Quebec Gazette of March 13th, the following obituary notice of the late Andrew Stuart, Esq., a distinguished member of the legal profession in Canada.

The decease of the late Andrew Stuart, Esq., her majesty's solicitor general in this province, has left a blank so difficult to be filled up in the public mind, that it is humbly conceived, some further tribute than has yet appeared to his memory will meet with a willing reception.

Mr. Stuart was the son of the late reverend John Stuart, D. D. and minister of Kingston, Upper Canada, a gentleman well known and highly respected in these provinces, and particularly noted for his generous patronage of humble merit, and his zealous efforts to promote the cause of education. His son, who is the subject of these remarks, was born at Kingston, in 1786. He received his classical instruction under the venerable archdeacon Strachan, then residing at Cornwall, now bishop of Toronto, with whom he held a most friendly correspondence to the period of his death. His proficiency in his studies, if we may judge by the correct habits of thinking to which it was the prelude, must have been conspicuous. He afterwards continued to prosecute his studies at Union college, Schenectady.

His commencement of the study of the law took place in 1802, and his admission to the bar, on the fifth of November, 1807. He rose almost immediately into extensive practice, his success being secured by three of the greatest qualities a lawyer can possess, extensive knowledge both of the principles and of the

practice of the law, convincing and overpowering eloquence, and the strictest regard to the interest of his client. In 1810, he defended Mr. Justice Bedard, then exposed to a state prosecution. From that time to the period of his death, his assistance was sought for in every difficult and important case that occurred.

His pleading was conducted with great eloquence, sometimes highly impassioned. He was remarkable for the use he made of general principles. It was a maxim with him, and which he professed to have derived from Aristotle, of whom he was an enthusiastic admirer, 'that all knowledge consists in universals.' Having once established his general position in some undeniable principle of reason, he seemed to come to his conclusion with irresistible conviction, as to a corollary of necessary and unavoidable consequence. Yet on proper occasions, he had the happy art of introducing those clear and palpable topics that rivet attention and touch all hearts. His argument in 1832, against the right of colonial assemblies to commit for breach of privilege in case of libel, is a beautiful specimen of forensic eloquence.

His jurisprudential studies were not confined to the laws of the country, or to those which regulated the decisions of its courts. He studied law as a science, founded in reason and governing man in all stages of civilization; and took delight in tracing the principles that have directed the various systems of legislation that have prevailed in different periods.

Among the legal objects extending beyond the usual limits, that claimed his attention, was the boundary question, so long the *questio vexatissima* between the British and American governments. His pamphlet on this subject evinces great research, and exemplifies those extended views with which he contemplated every subject to which he at any time bent his attention. It was first published in Quebec, in 1830, and again at Montreal, in 1839.

His attachment to justice, and consequently to established constitutional law, was ardent and invariable. He could not be drawn aside from that sacred path, as far as his judgment could mark its course, either by the authority of men in power and office, or by the prejudices, threats and murmurs of those who

happen to be the dispensers of popular applause. He considered that to be the only free state in which law was the supreme power, and in which its authority was uncontrollable.

In October, 1838, he was nominated solicitor general of the province, by his excellency the earl of Durham. Upon receiving this appointment, he removed his residence to Montreal ; but was prevented by ill-health from taking any very conspicuous part in the business before the courts. On this occasion he may be said to have terminated his professional career.

Mr. Stuart entered public life in 1815, when he was returned as one of the members for the lower town of Quebec. He represented the same respectable constituency in the two succeeding parliaments. He afterwards represented the upper town, and continued to do so in every parliament, except one, till the suspension of the constitution in 1838. To one of these he was elected in his absence.

During the course of his public life, he took part in the discussion of every important question that arose, in a period of peculiar interest and pregnant with important consequences to the future prosperity of this province. He sat in every committee, in which any important topic was to be discussed, or any difficult question to be investigated. His vast and varied information furnished assistance in all these inquiries, and he in no case shrunk from the communication of his ideas, either from the inconvenience of long and tedious attendance, or the obloquy it might raise against him amongst those who differed from him in opinion.

Mr. Stuart's views were, on all occasions, those of a liberal mind. He delighted to unfold them to the attention of others, both from the thorough conviction which he entertained of their truth, and still more from the enthusiastic persuasion that they were inseparable from the best interests of society. His arguments were founded on those extended principles which ever must be true. He raised his voice with equal fervor and equal sincerity, against the abuses practised by men in power, and the encroachments of popular violence. To neither would he yield the slightest deference beyond that which was sanctioned by justice and constitutional right.

At the time of the general election in 1834, he made at the hustings a candid and manly avowal of the principles which had uniformly guided his public conduct. His speech on that occasion is accurately reported in the *Quebec Gazette* of the 22nd of October of that year, and well deserves a perusal, from the independent spirit which it not only breathes, but proves by a reference to his past conduct. After a modest, yet dignified apology for speaking of himself, unavoidable on such an occasion, 'Never,' says he, 'when the property or the liberty of the subject had been infringed by men in power, have I shrunk from giving my entire energies, such as they were, to the defence and relief of the sufferers.' He then proceeds to remind the electors of his labors in the house, in regard to the abuses that had existed in the granting of land, to the improper combination of the legislative, executive, and judicial functions in the same persons, and to the protracted diversion of the Jesuits' estates from their just and legitimate objects. He states his determination to be, what it always had been, to pursue the same course by just, lawful, and constitutional means; but at no time by violence or passion. 'Much,' he further states, 'as I esteem the good opinion of my fellow-citizens, and the honor of representing them in the provincial parliament, I will not purchase even these boons at the cost of ceasing to deserve them.'

In 1832, he published at the Montreal press, an octavo volume, under the title of 'A Review of the proceedings of the Legislature in the session of 1831.' This work is replete with profound views of government, and contained ample warning of the perilous encroachments of the misguided democratic influence then evidently drawing to a crisis.

The election of 1834, already mentioned, led to the rejection of almost all the candidates favorable to the constitution, as it then existed, and to the connexion of these provinces with the United Kingdom. Such a state of things naturally led the friends of these important privileges to consider what was to be done to preserve them. A public dinner was given at Quebec in honor of Mr. Stuart, and other candidates who had been rejected for their constitutional and loyal conduct. The interchange of sentiments

which took place on this occasion, gave rise to the formation of the constitutional association, an institution fraught with many important results to the future history of this country. Mr. Stuart was the first chairman of the association, and took a prominent part in all the proceedings in which it engaged. A similar association was formed in Montreal, and by the spirit which pervaded both, much was successfully done to defeat the virulent domination of the opposite party.

In the spring of 1838, he was sent to England, at the instance of the association, for the purpose of forwarding the re-union of the provinces. He returned in September of the same year, thus concluding the last public mission in which he was engaged.

Mr. Stuart's literary attainments were of a high order; his taste, in the fine arts, just; his acquaintance with the literature of the day, extensive. He possessed an intimate acquaintance with ancient learning, especially with the works of the great model of Roman eloquence. To peruse and digest the rhetorical works of Cicero, was his greatest amusement. He had thoroughly considered both the precepts which they contain, and the principles in human nature on which these are founded.

It is natural for every one possessing such a taste and such predilections as his, to desire not only to know, but to inspect societies of different forms and attainments, and to view the venerable remains of ancient art and grandeur. Accordingly, yielding to this very reasonable inclination, he left Quebec in July, 1824. After visiting the most noted objects in the United Kingdom, he spent the winter in the south of France and in Italy, and returned to Quebec in January, 1826. It is easy to see, that such a tour must have yielded him infinite gratification; and those who knew him knew that it added another charm to his conversation, which had, at all times, been highly attractive.

The attractions of his conversation formed, indeed, one of the marked features of his character. To pass them over in this place, would be unpardonable. His habits of theorizing accompanied his observations, even in his freest and most unguarded moments, the moments when all effort is felt to be unnecessary;

and being always on the side of humanity and good feeling, inevitably fascinated every heart. It was impossible to resist the enchantment of his colloquial intercourse. His observations were founded on the universal principles of human nature, and found an echo in every mind.

To all institutions promoting literary purposes, Mr. Stuart was an ardent friend, and among others to the Literary and Historical Society of Quebec. He entertained an earnest, and a kind of paternal solicitude for its advancement. Besides promoting its interests, by his personal influence, he communicated to it, or read before it, a great number of interesting papers, and exerted himself with great zeal to forward the publication of its transactions. He found the means of obtaining those funds from the legislature, which have enabled it to publish several original documents procured from various quarters in Europe and America, illustrative of the previous history of this country.

The papers which he supplied to the society's transactions are indications of an original, and in some degree, a romantic mind. The first is to be found in the first volume, page 52, and is entitled, 'Notes on the Saguenay Country.' His mind had long been impressed with the magnificent scenery of that portion of the province, and anticipating its future usefulness as a resource for emigration, he delighted in recalling to the view of the existing generation, the purposes to which the first settlers of the country had found it capable of being applied. His next contribution is in the same volume, p. 176, on the "Ancient Etruscans." It indicates a vast extent of reading, an acquaintance with authors seldom to be met with, and views that are familiar only to an expanded mind. The last is in the third volume, page 365, entitled, "Detached Thoughts upon the History of Civilization." It indicates like that just mentioned, great comprehension of thought, and a vast extent of reading. Though not finished according to the evident intention of the author, and rather the opening up only of the subject, it has the effect of fixing the reader's attention upon a number of the most important peculiarities of ancient manners.

After what has been said, it is almost unnecessary to add, that

in private life he was most strictly honorable, sincere, kind hearted, generous and friendly. The public life which has been described could never have arisen out of the opposite disposition. It was the fruit of his prevailing temper of mind, of his constitution and habit of thinking.

In conclusion, it is gratifying to add, that Mr. Stuart was a sincere friend to religion. He spoke at all times with the highest respect of its ministers, its institution, and its code. He contemplated the truths which it teaches, with the deepest reverence; and looked forward to the closing scene of human existence, with mingled sentiments of reasonable anxiety and enlightened hope.

He died on the 21st February, 1840. His funeral was followed by a vast concourse of persons, who feelingly deplored the loss they now sustained.

Mittermaier's German Criminal Procedure. The first volume of a new (the third) edition of this valuable work, with additions, has just been published at Heidelberg. It contains references to all the recent statutory legislation of the states of this union, on subjects of criminal law.

To our Readers. We intended, in the present number, to have presented our readers with an article on the effect of drunkenness, as a ground of relief from criminal responsibility,—and a review of the second part of Lieber's Political Ethics;—but we have been obliged to defer them both, for reasons beyond our control. We shall give them in our next;—which will also contain articles on the law of contracts (continued),—on the rights of slaveholding states, &c. (continued),—and on mistakes of law (continued).

QUARTERLY LIST OF NEW PUBLICATIONS.

ENGLAND.

A Treatise on the Law of Limitations, with an Appendix of statutes and forms. By *G. B. Mansell, Esq.*, Barrister at Law.

Commentaries on the Law of Nations. By *W. Oke Manning, Jun., Esq.*

The Statute Criminal Law of England, as regards indictable offences : arranged in classes according to the degrees of punishment, (forming the Appendix to the Fourth Report of the Commissioners on Criminal Law). With notes. By *John James Lonsdale, Esq.*, of Lincoln's Inn, Barrister at Law.

A Treatise upon the Law and Practice of the Court for the Relief of Insolvent Debtors, with an Appendix, &c. By *Edward Cooke, Esq.*, of the Middle Temple, Barrister.

A new Law Dictionary, containing explanations of such technical terms and phrases as occur in the works of the various law writers of Great Britain. To which is added an outline of an action at law and of a suit in equity. Designed expressly for the use of Students. By *Henry James Holthouse, Esq.*

A Practical Guide to Executors and Administrators, &c. By *Richard Matthews*, of the Middle Temple, Esq., Barrister at Law.

The Law of Parliamentary elections, Part I, &c. By *B. Montagu, Esq.*, Q. C., & *M. J. Neale, Esqrs.*, Barristers at Law.

The Theory and Practice of Conveyancing. By *Solomon Atkinson, Esq.* Barrister at Law.

UNITED STATES.

Reports of Cases determined in the Supreme Judicial Court of the State of Maine. By *John Shepley*, Counsellor at Law. Volume III. Maine Reports. Vol. XV. Hallowell : Glazier, Masters and Smith, 1840.

Reports of Cases argued and determined in the several courts of Law and Equity, in England, during the year 1839. *Jurist Edition*. Vol. I. New York : Halsted & Voorhies, 1840.

A Treatise on the Law of Evidence. Fifth American from the eighth London edition, with considerable additions. By *S. March Phillips*, Esq., and *Andrew Amos*, Esq., Barristers at Law. With notes and references to American Cases. Parts I and II. New York : Halsted & Voorhies, 1839.

Digest of the Decisions of the Courts of Common Law and Admiralty in the United States. By *Thereon Metcalf* and *Jonathan C. Perkins*. Vol. I. Boston : Hilliard, Gray, and Co., 1840.

Letter to His Excellency Patrick Noble, Governor of South Carolina, on the Penitentiary System. By *Francis Lieber*.

Argument for the Plaintiffs, in the case of *Wildes* and others *v.* *Parker* and another, in the Circuit Court of the United States for the District of Massachusetts, January Term, 1840. By *Ivers J. Austin*, of counsel for the Plaintiffs.

A Treatise on the Law of Insurance. By *Willard Phillips*. In two volumes. Second Edition. Boston : Charles C. Little and James Brown, 1840.

[We shall notice this new and enlarged edition of a most valuable work in a future number.]

Reports of Cases argued and determined in the court of Chancery of the State of New York. By *Alonzo C. Paige*, Counsellor at Law. Vol. VII. New York : Gould, Banks & Co., 1839.

Digested Chancery Cases, contained in the Reports of the Court of Appeals of Maryland. By *James Raymond*, of the Maryland Bar. Baltimore : Cushing & Brother, 1839.

Commentaries on the Law of Bailments, with illustrations from the Civil and the Foreign Law. By *Joseph Story*, LL. D., Dane Professor of Law in Harvard University. Second Edition. Revised, corrected, and enlarged. Boston : Charles C. Little and James Brown, 1840.

IN PRESS.

By Charles C. Little and James Brown.

A Treatise on the Rights and Duties of Merchant Seamen, &c. By *George T. Curtis*.

Digest of the Massachusetts and Pickering's Reports. By *J. C. Perkins* and *J. H. Ward*.

A Treatise on the Common Law in relation to Water Courses. Second edition, much enlarged. By *Joseph K. Angell*.

AMERICAN JURIST.

NO. XLVI.

JULY, 1840.

ART. I.—LAW OF CONTRACTS.

No. 8.—*Construction of Contracts.*

As agreements derive their force from the mutual assent of the parties to certain terms, it follows that the operation and extent of every agreement is to be ascertained from the intention of the parties. This intention is to be collected from the expressions used by the contracting parties.

Mr. Fonblanque defines interpretation, or construction, to be the collection of the meaning of the contract from the most probable signs. Mr. Powell says construction is the drawing of an inference, by the aid of reason, as to the intent of a contract, from given circumstances, upon principles deduced from men's general motives, conduct and actions.¹

¹ Vattel's chapter on the interpretation of treaties contains an exposition, most of which is applicable to contracts between individuals, and deserves an attentive perusal. Sheppard's Touchstone, ch. v., on the exposition of deeds, should also be studied. And students should not fail to examine, with care, the twelve rules for the interpretation of agreements, which are laid down by Pothier in his treatise on the law of obligations. See also 1 Domat, 86, 87; Rutherford, book ii. ch. 7.

The necessity of rules of construction arises from the imperfection of language, and from the imperfect use of it in those instances in which language wholly unequivocal and explicit might be selected. "If," says Vattel, "the ideas of men were always distinct and perfectly determined—if, in order to make them known, they had only proper terms, and none but such expressions as were clear, precise, and susceptible of only one sense—there would never be any difficulty in discovering their meaning in the words by which they would express it. Nothing more would be necessary than to understand the language."

Even in this state of things, however, it is obvious to every one who has experience in the affairs of life, that rules of construction would be necessary. In contracts where more than one definite object is stipulated for—at least wherever a *general* object is intended to be secured by a stipulation concerning a *variety of particulars*—it is hardly possible to foresee every case that will arise even under the course of events that is anticipated. Much less can the state of affairs be foreseen which new conjunctures and unexpected events will inevitably produce. Yet it would be highly injurious to both parties, if the exact literal stipulations of a complicated contract were to be performed, and nothing more; and therefore it is necessary to resort to construction—that is, to inductions drawn from the general views of the parties (as expressed in their contract) with reference to the existing circumstances; in other words—to collect, from the object, drift and spirit of their agreement, what their leading and paramount intentions were, and to carry those intentions into effect.

Thus it often happens that a contract evinces a general and also a particular intent. The particular intent, perhaps, cannot be carried into effect at all; or if it should be, it would wholly, or in a great measure, defeat the general intent. In such cases—though there is no doubt of the

parties' views, as expressed in their contract,—courts will so construe their words as to give effect to their general intent. This is not only reasonable in itself, but is also manifestly conformable to the design of the parties, as displayed by the general spirit of their agreement.¹

The rules of construction are, in general, the same in law and in equity;² in simple contracts and contracts by specialty.³ But courts of equity have greater powers than courts of law, to modify contracts according to subsequent exigencies. It sometimes happens that courts of law cannot afford an ample, or even any, remedy on a contract, on account of the necessary construction which they give it. But a court of chancery will enforce it *cy pres*; that is, as nearly in conformity to the terms of it, as is practicable: *ut res magis valeat quam pereat*. This is done at the instance of the promisee, when he prefers a partial execution of what he supposed to be his rights, to a total failure of his claim.

Language, however, is of itself imperfect and equivocal; and the manner in which it is used often increases the difficulty of acquiring clear and definite notions of the speaker's or writer's meaning. Mr. Locke's third book of his Essay concerning the Human Understanding is as useful to members of the legal profession, as to any other class of scholars; and his ninth, tenth and eleventh chapters, on the imperfection and abuse of words, and the remedies of those imperfections and abuses, are very pertinent to the subject of contracts and the interpretation of them.

This imperfection and abuse of language render it extremely important that certain fixed canons of interpretation should be adopted, in order to give a uniform effect to the stipulations of contracting parties, who resort to judicial tribunals for the enforcement of rights and redress of wrongs

¹ See 3 Bur. 1634; 2 D. & E. 254; 1 Doug. 277.

² 2 Bur. 1108; 3 Bl. Com. 431.

³ 13 East, 74, per Lord Ellenborough.

arising from contracts and the breach of them. If rules of interpretation would be necessary (as we have seen) even were language clear and unequivocal, and the ideas of the parties precise and determinate—such rules become indispensable, when language itself is defective, and by an abuse and ignorance of it, men involve their agreements in what Mr. Roberts terms “amphibology of diction, and delitescency of meaning.”

We shall attempt only a general statement of some of the most prominent rules of construction, and a few practical illustrations of those rules.

The first principle of construction, and that upon which rest all the rules, which will be hereafter mentioned, is this—namely, that the apparent intent of the parties shall be regarded, so far as the rules of law will permit: *Verba intentioni, non e contra, debent inservire*. The purpose of construction is to *find* the meaning of the parties; not to *impose* it.¹

1. As a general rule, the terms of a contract are to be understood in their ordinary and popular sense, rather than in their strict grammatical or etymological meaning.²

But it is as true in law, as in criticism on other subjects, that usage is to govern in the application of language:

——— si volet usus,
Quem penes arbitrium est, et jus, et norma loquendi.

Hence, there is an exception to the rule just mentioned, in those cases in which words have acquired, by usage, a peculiar sense different from the ordinary and popular one. And it is, in such cases, immaterial whether the sense, acquired by usage, be the strict grammatical or etymological one, or one which departs from all philological as well as popular and ordinary meaning, and is wholly anomalous.

¹ Plowd. 160; Shep. Touch. 86; 1 Doug. 277; 7 D. & E. 423. 678.

² Plowd. 169; 4 East, 135; 3 Dallas, 240; 3 Missouri Rep. 447, *Pavey v. Burch*.

Buller J. says a policy of assurance has at all times been considered, in courts of law, as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage.¹ In the same case, lord Kenyon said, "I remember it was said, many years ago, that if Lombard street had not given a construction to policies of insurance, a declaration on a policy would have been bad on general demurrer; but the *uniform practice* of merchants and underwriters had rendered them intelligible."²

Where, in any case, language has acquired a peculiar meaning with reference to the subject matter of a contract, that meaning shall prevail in that particular case.³ Hence, mercantile contracts are construed according to the sense attached by mercantile usage to the terms employed by the parties. And so of other contracts, not strictly mercantile, if there be a usage which the parties must be supposed to have had in view, when their contracts were made. But this construction cannot be allowed to prevail, unless the terms of the contract are general, or doubtful, on the face of them. If the terms employed are inconsistent with the construction which usage, &c., would give them, they must have the meaning which the parties obviously intended.⁴ A commercial usage will be considered as established, when it has existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made with reference to it. No specific time can be prescribed.⁵

¹ Brough v. Whitmore, 4 D. & E. 210.

² See also 2 Bos. & Pul. 167. 168.

³ Bridge v. Wain, 1 Stark. Rep. 410; Scott v. Bourdillion, 2 New Rep. 213; 3 Stark. Ev. 1033.

⁴ 2 Stark. Ev. 453, et seq.; 3 Stark. Ev. 1036; Dickinson v. Lilwall, 4 Campb. 279; Gibbon v. Young, 8 Taunt. 260; Lewis v. Thatcher, 15 Mass. 433; Webb v. Plummer, 2 Barn. & Ald. 746; 2 Phil. Ev. 45. 46.

⁵ Noble v. Kennoway, 2 Doug. 513; Barber v. Brace, 3 Connect. 9; Smith

So the ordinary and popular sense of terms may be controlled by local usage and understanding, and by the law of the place where the contract is made, or with reference to the laws of which it is made.¹ Ashhurst, J., says, "it may be necessary to put a different construction on leases made in populous cities from that on those made in the country."² A "pack of wool," in Yorkshire and in Wiltshire, may perhaps differ in weight; and the words would be construed to mean the one weight or the other, according to the place where a contract is made.³ So of "cotton in bales;" in some places, compressed bales are meant by these words; in other places, bags merely.⁴ So if one sell tods, pounds, bushels, yards, ells, or perches, of any thing, they will be accounted, measured and reckoned according to local custom.⁵ But if a particular measure is established by law, with a prohibition against using any other, that measure will be understood, notwithstanding any local usage to the contrary.⁶

The usages of banks, where parties to notes and bills are accustomed to transact business, are recognized by courts as evidence of the assent of such parties to those usages, and therefore as giving a construction to their contracts different from the ordinary meaning of the terms employed, or implied by law, in cases where no such usages prevail. But a knowledge, express or implied, of the usage, must be brought home to the party who is to be affected by it.⁷

v. Wright, 1 Caines, 43; *Rapp v. Palmer*, 3 Watts, 178; *Collings v. Hope*, 3 Wash. C. C. 150; *Davis v. New Brig*, Gilpin, 486; *Trott v. Wood*, 1 Gallis. 444; *Chastain v. Bowman*, 1 Hill, 270.

¹ 1 Domat, 36, § 9.

² 2 D. & E. 760. See also 1 Doug. 207; 6 Greenl. 225; 21 Pick. 372.

³ 1 Poth. 50, n. (b).

⁴ *Taylor v. Briggs*, 2 Car. & P. 525.

⁵ 1 Pow. Con. 376. See also 1 Bulst. 175, *Hewet v. Painter*.

⁶ *Master, &c. of St. Cross v. Lord Howard de Walden*, 6 D. & E. 338; *Hockin v. Cooke*, 4 D. & E. 314. See also 3 D. & E. 271; 4 D. & E. 750.

⁷ See *Jones v. Fales*, 4 Mass. 245; *Lincoln, &c. Bank v. Page*, 9 Mass. 155;

If words have a known legal meaning, usage cannot control that meaning. To give effect to a usage, in such case, it must be specially included or referred to in the contract, or the words must be explained in the contract itself, so as to conform to the usage.¹ This rule, however, does not, it seems, always hold in parol contracts.²

Technical words in a deed are to be construed according to their legal meaning.³

2. Construction is to be what the common lawyers term favorable; that is, if the terms of an agreement are susceptible of two senses, they are to be understood so as to have an actual and legal operation.

If therefore the ordinary and grammatical sense of words used in a contract render it ineffective or frivolous, they are to be construed according to their less obvious and more remote meaning: *Verba aliquid operari debent, et cum effectu sunt accipienda; debent intelligi ut aliquid operentur*. Thus, "to," "from" and "until," if used in their strict and most proper sense, are exclusive of the subject to which they refer. But if this sense would render an agreement nugatory, they shall be construed to include the subject.⁴ The same construction is to be adopted in order to prevent contradiction and absurdity;⁵ also to save a contract from being void for illegality—the law making no presumption

Whitwell v. Johnson, 17 Mass. 449; Renner v. Bank of Columbia, 9 Wheat. 582; City Bank v. Cutter, 3 Pick. 414; Mills v. Bank U. States, 11 Wheat. 430; Bank of Washington v. Triplett, 1 Pet. 25; Brent's Ex'rs. v. Bank of Metropolis, 1 Pet. 89.

¹ Doe v. Lea, 11 East, 312; 2 Stark. Ev. 455; 3 Stark. Ev. 1038; Sleght v. Rhineland, 1 Johns. 192.

² Doe v. Benson, 4 Barn. & Ald. 588; Den v. Hopkinson, 3 Dowl. & Ryl. 507; Furley v. Wood, 1 Esp. Rep. 199.

³ 4 Watts, 89.

⁴ See 3 Leon. 211; 5 East, 254—260; 1 Doug. 382; 1 Bur. 235: Cowp. 714; 1 D. & E. 490.

⁵ Carter, 108, 109; 1 Poth. (Philad. ed.) 48, 49, notes; 1 Freem. 247; T. Ray. 68; 1 Sid. 105; Finch's Law, 52; Fonbl. Book I. c. 6, § 18; Willes, 332.

against the validity of an agreement. "Whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken."¹

This rule of favorable construction must, however, bend to the intention of the parties; the purpose of it being, like that of all other rules of construction, to give effect to such intention. If therefore the parties obviously meant to make a frivolous, absurd, or unlawful agreement, they must abide by the legal consequences.

3. The subject matter of an agreement is to be considered in construing the terms of it; and they are to be understood in the sense most agreeable to the nature of the agreement: *Verba generalia restringantur ad habilitatem rei, vel aptitudinem personæ.*²

Thus, a stipulation in a policy of insurance, that a ship shall "sail or depart with convoy," is held to mean "convoy for the voyage." The subject matter of such agreement is a voyage, and merely departing with convoy, and then proceeding alone, would be no protection to the ship on the voyage.³ And the captain must take sailing orders, or directions as to keeping with the convoy, obeying signals, &c. Otherwise the security intended by convoy would not be procured.⁴ So a license to load a cargo in an enemy's country, and import it into Great Britain, authorizes a purchase of the cargo.⁵ In *Penn v. Glover*,⁶ there was a condition in a lease, that the lessee should not molest, vex, or put out any copyholder, paying his duties and services, under the penalty of forfeiture. The lessee entered into a

¹ Co. Lit. 42.

² 1 Pow. Con. 377; 1 D. & E. 703.

³ *Jeffereys v. Legendra*, 1 Show. 321; *Lilly v. Ewer*, 1 Doug. 72.

⁴ *Webb v. Thompson*, 1 Bos. & Pul. 5; *Anderson v. Pitcher*, 2 Bos. & Pul. 164.

⁵ *Fenton v. Pearson*, 15 East, 419.

⁶ Mo. 402; S. C. Cro. Eliz. 421.

cowhouse and beat a copyholder. A forfeiture was claimed under the word "molest." But it was held, that the molestation must be such as should be an expulsion, or molestation concerning the copyhold tenement; that a tort to the person of a copyholder was not intended.

A grant of common out of *all* one's manor authorizes the grantee to depasture his cattle only in commonable places, and not in the grantor's garden. So a grant of *all* trees growing on a farm does not extend to fruit trees, if there be any other trees on the farm.¹ A general covenant for quiet enjoyment of land extends only to evictions and disturbances by title. But a covenant to indemnify against a particular person, by name, extends to entries and disturbances of that person by tort as well as by right.² So if the condition of a bond be that the obligor shall not hurt or molest the obligee "on any account," it shall be construed to be a wrongful molestation, and not to hinder the obligor from pursuing the obligee for crimes committed by him, or for any other just cause.³

Under this third rule of interpretation may also be given the following cases, where general words are restrained by the subject matter of the contract.

The use and object of a sweeping clause are, generally, to guard against any accidental omission; but it is meant to refer to estates or things of the same nature and description with those that have been before mentioned.⁴ A release of all demands, when a particular demand is acknowledged to have been received, is confined to the demand specified.⁵ In 2 Rol. Abr. 409, it is said, "if a man should receive £10, and give a receipt for it, and doth thereby acquit and re-

¹ Pow. Con. 377; Shep. Touch. 86, 87.

² Dalis. 58, pl. 8; 110, pl. 2; Chanudflower v. Prestley, Yelv. 30, and cases in note. Greenby v. Wilcocks, 2 Johns. 1.

³ Dobson v. Crew, Cro. Eliz. 705.

⁴ Per Ld. Mansfield, Cowp. 12.

⁵ 1 Pow. Con. 391 et seq. 1 Domat, 38, § 21.

lease the person of all actions, debts, duties and demands, nothing is released but the £10; because the last words must be limited by those foregoing." Lord Holt is reported¹ to have denied this case in Rolle; but lord Ellenborough² said, he was sorry to find that it had been denied to be law, because it seemed to him to be as sound a case as could be stated. And it is now, doubtless, the settled law of England and of this country.³

But if the general words of a release stand alone, without any recital, or reference to the subject matter on which it is to operate, the rule does not apply. In such case, the release is taken most strongly against the releasor.⁴ Extrinsic evidence cannot be admitted to explain the releasor's intentions, and to what demand the release is to be applied;⁵ otherwise, of a receipt.⁶

Where the condition of a bond is larger than the recital, the recital shall restrain it—on the principle that the condition is to be confined to the subject matter. The recital shows what the subject matter is. "The condition cannot be taken at large, but must be tied up to the particular matters of the recital."⁷ Thus, where the condition of a bond recited that the obligee had made the obligor bailiff of the hundred of Brixto, and the engagement was that the obligor should make true return of all warrants directed to him; on a suit upon this bond, alleging that the obligee made a warrant to the obligor to execute a certain process,

¹ 1 Show. 155.

² 4 M. & S. 427.

³ Bac. Abr. *Release*, K; *Cole v. Knight*, 3 Mod. 277; *Abree's case*, Hetl. 15; *Payler v. Homersham*, 4 M. & S. 423; *Lampon v. Corke*, 5 Barn. & Ald. 606; *Lyman v. Clarke*, 9 Mass. 235; *Munro v. Allaire*, 2 Caines, 329; 5 Johns. 335, per Kent, C. J.

⁴ *Thorpe v. Thorpe*, 1 Ld. Raym. 235; Bac. Abr. *Release*, K.

⁵ *Butcher v. Butcher*, 1 New. Rep. 113; *Pierson v. Hooker*, 3 Johns. 68.

⁶ 3 Stark. Ev. 1044. 1272; 8 Johns. 389; 9 Johns. 310; 1 Johns. Cas. 145; 11 Mass. 32; 4 Greenl. 427.

⁷ Per Eyre, J. Gilb. Cas. 240.

and that he had not returned it, it was held, on demurrer, that no cause of action was shown; because the generality of the condition must be restrained by the recital, and the defendant was liable only for not returning warrants to be executed within the hundred of Brixto: *Non constat*, on these pleadings, that such was the warrant which the defendant, as was alleged, had not returned.¹ After verdict, however, judgment would not be arrested for such cause. It would be intended that the warrant was directed to the defendant as bailiff of the hundred for which he was appointed.² In *Pearsall v. Summersett*,³ the condition of the bond recited that the plaintiff had accepted, indorsed, &c. divers bills of exchange for the accommodation of W., several of which were outstanding, and in order to indemnify the plaintiff, in respect thereof, from all losses, charges, &c. the defendant stipulated to pay all that the plaintiff had advanced, or thereafter should advance, on account of W. It was held, that the condition should be confined to payments in respect to bills accepted before the date of the bond.

In a suit on a bond reciting that J. had been appointed deputy postmaster for the term of six months, and with a condition that during all the time he should continue in that office, he would faithfully perform the duties, &c.—it was held, that the surety of J. was not liable for his default after six months had elapsed.⁴ So where the condition of a bond is for the good conduct of a person in an office which is annual, &c. though the condition purport to be commensurate with his continuance in office, and he be reelected or reappointed, yet the obligor is liable only during the continuance of the office under the first election or appointment;⁵ otherwise, if the office is not by law an annual one,

¹ *Stoughton v. Day*, Style, 18. S. C. Aleyn, 10.

² *Weston v. Mason*, 3 Bur. 1727.

³ 4 Taunt. 593.

⁴ *Arlington v. Merricke*, 2 Saund. 414, and *note* (5).

⁵ *Liverpool Water works v. Atkinson*, 6 East, 507; *St. Saviour's v. Bos-*

though the officer may be annually elected or appointed.¹ Where a bond was given for the fidelity of an accountant in a bank, and that he should continue in the service of the bank for two years, the bond was held to secure the bank while the accountant was in their service; the mention of two years only preventing his sooner leaving the service.²

So if there is a change of parties, the obligor and his sureties are not held on the contract. As where a bond was given for the fidelity of a clerk of the obligee, and the obligee entered into partnership with a third person, and the clerk was afterwards guilty of misconduct in the partnership business.³ So in case of a material variation in the mode or extent of transacting the business of the obligee.⁴ So where a bond was given to several persons as governors of a voluntary society, with a condition for the faithful collection and accounting, &c. of H. to the obligors, and their successors, as governors, and the society afterwards was incorporated; a default of H., after the incorporation, was held not to be covered by the bond.⁵ In *Barclay v. Lucas*,⁶ on a bond reciting that the obligees "had agreed to take one" Jones into their service, and employ him, as a clerk in their shop and counting house, and that the defendants had

took, 2 New Rep. 175; *Hassell v. Long*, 2 M. & S. 363; *Bigelow v. Bridge*, 8 Mass. 275; *U. States v. Kirkpatrick*, 9 Wheat. 720; *Commonwealth v. Fairfax*, 4 Hen. & Munf. 208; *Commonwealth v. Baynton*, 4, Dallas, 282; *S. Carolina Society v. Johnson*, 1 McCord, 41; *S. Carolina Ins. Co. v. Smith*, 2 Hill, 589.

¹ *Curling v. Chalklen*, 3 M. & S. 502; 1 New Rep. 40, per Mansfield, C. J. *Dedham Bank v. Chickering*, 3 Pick. 335.

² *Worcester Bank v. Reed*, 9 Mass. 267.

³ *Wright v. Russell*, 3 Wils. 530; *S. P. Barker v. Parker*, 1 D. & E. 287; *Strange v. Lee*, 3 East, 484; *Bellairs v. Ebsworth*, 3 Campb. 53.

⁴ *Bartlett and Bowdage v. Attorney General*, Parker's Rep. 277, 278; *Miller v. Stewart*, 9 Wheat. 680; *Boston Hat Manufactory v. Messenger*, 2 Pick. 223. See also 4 Pick. 314; *Fell on Guaranties*, chap. v.

⁵ *Dance v. Girdler*, 1 New Rep. 34. ⁶ 1 D. & E. 291, note.

agreed to become security for his fidelity, &c., and the condition was that Jones should faithfully account, &c.; it was held that the sureties were liable for the misconduct of Jones, after the obligees had received a new partner into their business. This decision was made on the ground that the intention of the parties was to take and give security *to the house*; and in England the house frequently continues under the original firm, though there is a succession of partners. But this decision has been questioned by counsel and judges, and probably would not now be regarded as authority, except under precisely similar facts. The case of *Wright v. Russell*,¹ there doubted, has been repeatedly confirmed. In *Metcalf v. Bruin*,² where a bond was given to the trustees of a numerous and fluctuating body, called the Globe Insurance Company, to secure the fidelity of a servant of the company "during his continuance in the service of the company," it was held that the actual existing body of persons, carrying on the same business under the same name, were intended by the bond; and that the obligees, who were trustees of the company, were entitled to sue for a breach of the bond by the servant, which happened after a change in some of the members of the company.

But the recital in the condition of a bond does not confine the responsibility of the obligor to the limits of the recital, where the condition itself manifestly is designed to be extended beyond the recital. The rule holds only in case of general terms consistent with the limitation expressed, or to be collected from the scope of the contract. Therefore, where the condition of a bond, in addition to matter mentioned in the recital, contained a stipulation for indemnity against claims arising from acceptances "or any other account thereafter to subsist" between the parties, it was

¹ 3 Wils. 530.

² 12 East, 400.

held that a transaction, not specified in the recital, was provided for in the condition.¹

Guaranties, or letters of credit, are construed strictly; the generality of the words being restrained to the particular case in view of the guarantor, in all instances in which such a course is not inconsistent with the terms employed.² The principle applied to guaranties is the same which is applied to bonds with conditions; and the cases on both species of contracts are cited by counsel, and commented on by courts, as mutual authorities.

In *Unien Bank v. Clossey*,³ it was held that the condition of a bond that a clerk in a bank should "well and faithfully perform the duties assigned to and trusts reposed in him," applied to his honesty only, and not to his ability; and that for a mere mistake of the clerk, his sureties were not responsible. But in *Minor v. Mechanics' Bank of Alexandria*,⁴ the supreme court of the United States decided that a condition "well and truly" to execute official bank duties, included not only honesty, but reasonable skill and diligence. The supreme courts of Massachusetts, New Jersey and Pennsylvania have made like decisions.⁵ "The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties would be utterly illusory, if we were to narrow down its import to a guaranty against personal fraud only."⁶

The contracts of sureties are always strictly construed; and it is not improbable that in some of the cases which

¹ *Sansom v. Bell*, 2 Campb. 39; S. P. Com. Dig. *Parols*, A. 19; *Watson v. Boylston*, 5 Mass. 411.

² See 2 Stark. Ev. 648; Fell on Guaranties, chap. v.; *Melville v. Hayden*, 3 Barn. & Ald. 593; *Norton v. Eastman*, 4 Greenl. 521.

³ 10 Johns. 271.

⁴ 1 Pet. 48

⁵ *American Bank v. Adams*, 12 Pick. 303; *State Bank v. Chetwood*, 3 Halst. 25; *Barrington v. Bank of Washington*, 14 S. & R. 405.

⁶ Per Story, J, 1 Pet. 69.

have been cited, a more liberal and extended construction might have been given to the stipulations, if the principal only had been concerned. But the same construction is given to a bond with sureties, when the principal is sued alone, as when all are sued, or the sureties only.¹

In *Williams v. Jones*,² a bond, given by G., a postmaster appointed for three years, was held to be a security for defaults after the three years expired; he continuing in office, without any new appointment or bond. But his successor had been obliged to give bond for the arrears of G., and had taken out a *scire facias* against G., and afterwards an extent; and he was held to be entitled to hold G's. land against the assignee of G., who took it from G. before the expiration of three years; as well for the amount of G's. default after that time, as for the small sum in which G. was in arrear when the three years expired. If this case be law, it probably stands on the ground of prerogative, by which the crown, and its debtors and assignees, are placed on different grounds from subjects and their contracts with each other.³

4. The whole contract is to be regarded in giving it a construction, and one part is to be interpreted by another. *Ex antecedentibus et consequentibus fit optima interpretatio. Turpis est pars, quæ cum suo toto non convenit.*⁴

Most of the cases, cited under the preceding rule, are perhaps equally included in this.

In the *Duke of Northumberland v. Errington*,⁵ Buller, J. said, "it is immaterial in what part of a deed any particular covenant is inserted; for in construing it, we must take the whole deed into consideration, in order to discover the

¹ 8 Mass. 276.

² Bunb. 275.

³ See *Wightwick, 34, The King v. Smith*—that the king takes priority of a purchaser, in case of debts of his officers and receivers. The crown has a lien on the officer's lands, &c. in case of a contract by speciality.

⁴ Plowd. 161; Winch, 93; 1 Domat, 37, § 10; Shep. Touch. 87.

⁵ 5 D. & E. 526.

meaning of the parties." In that case, it was held that the general words in the beginning of the lessee's covenant, "jointly and severally," &c. extended to all the subsequent covenants, though those words were not repeated in every covenant throughout the deed: Because it would not have answered the lessor's purpose that the lessee should be bound separately in the subsequent covenants. Lord Alvanley says, "however general the words of a covenant may be, if standing alone, yet if from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words. If such an inference does arise from concomitant covenants, they will control the general words of an independent covenant in the same deed." ¹

A very early case² illustrates this rule laid down by lord Alvanley. A lessor covenanted that he had made no former grant or any thing whereby the grant or assignment might be in any measure impaired, hindered or frustrated, but that the assignee, by virtue of that grant and assignment, might quietly have, hold, &c. without any impediment or disturbance by him, or by any other person. Dower was assigned to the wife of a former owner of the leased premises, and a suit was brought on a bond given by the lessor to perform the covenants in his assignment; and it was held that the generality of the latter covenant was restrained by the words of the former; that the lessor had covenanted for quiet enjoyment only against other persons having right derived from him.

The ablest and most lucid judgment, on the application of this rule, which the books contain, was given by lord

¹ 3 Bos. & Pul. 574, 575.

² Broughton v. Conway, Dyer, 240; Mo. 58; Dalis. 58, pl. 8; S. P. Dalis. 110, pl. 2.

Eldon, in the case of *Browning v. Wright*.¹ Parker, J.,² calls it "a triumph of common sense." Wright bargained, sold, &c. to Browning, his heirs, &c. a parcel of land, and warranted it against himself, and covenanted that notwithstanding any act, by him done to the contrary, he was seized lawfully and absolutely in fee simple, *and that* he had a good right, full power, &c. to convey. The breach of covenant, alleged in the declaration, was, that Wright had not good right, full power, &c. to convey to the plaintiff, for that one Child and his wife were lawfully and rightfully seized of said land, and had a lawful and rightful title thereto not derived from the plaintiff (Browning), and that he had been obliged to become tenant to Child and wife; and thus lost his fee simple in the estate conveyed. It was held that the covenant, viz., that Wright had good right, lawful title, &c. was either a part of the preceding special covenant, or, if not, that it was qualified by the other special covenants against the acts of himself and his heirs only. "We do not do justice to the parties," said Buller, J., in that case, "unless we look to the whole deed, and infer from that their real intention. The defendant has expressly told us, in one part of the deed, that he means to covenant against his own acts; and are we to say that he has, in the same breath, covenanted against the acts of all the world?"³

On the same principle of construction, it was held, where lord Rich, on conveying land, covenanted that it was worth

¹ 2 Bos. & Pul. 13.

² 8 Mass. 217. See also *Stannard v. Forbes*, 6 Adolph. & Ellis, 572.

³ See also, on this point, 1 Leigh's *Nisi Prius*, 613, 614; *Foord v. Wilson*, 8 Taunt. 543; *Milner v. Horton*, McClel. 644; *Sicklemore v. Thistleton*, 6 M. & S. 9; *Sugden on Vendors*, ch. xiii.; *Gainsford v. Griffith*, 1 Saund. 58, and notes; *Howell v. Richards*, 11 East, 633; *Nind v. Marshall*, 1 Brod. & Bing. 319; *Cole v. Hawes*, 2 Johns. Cas. 203; *Whallon v. Kaufman*, 19 Johns. 97; *Knickerbacker v. Killmore*, 9 Johns. 106; *Barton v. Fitzgerald*, 15 East, 530.

£1000 per annum, and so should continue, notwithstanding any act done, or to be done, by him—that the latter words “any act,” &c. extended to the time when the covenant was made, as well as to future time.¹

In *Jackson v. Stevens*,² where the owner of three fourths of a tract of land granted a moiety thereof by metes and bounds, with all the estate, right, title, &c. which he had in the above described premises, it was held that a moiety only passed by the deed.

In regard to agreements respecting a demise of lands, &c. subsequent words are often held to control prior ones; or rather to show what was intended by prior words. There are several cases, in which the question was raised whether an instrument is intended for a present demise, or a stipulation for a lease in future.³

5. Construction is to be such that the whole instrument, or contract, and every part of it, may take effect, if it be possible consistently with the rules of law and the intention of the parties.⁴

The last previous rule is perfectly consistent with this, though it may seem, at the first thought, to contradict it. Under that rule, every part of the agreement does take effect; and the effect intended by the parties. One part is construed, not destroyed nor impaired, by the other. Words, used in an apparently general sense, are held to have been

¹ *Rich v. Rich*, Cro. Eliz. 43. See also *Gervis v. Peade*, Cro. Eliz. 615; *Woodyard v. Dannock*, Cro. Eliz. 762. But see *Hughes v. Bennet*, Cro. Car. 495; *Craylord v. Craylord*, Cro. Car. 106; *Harriet v. Butcher*, Cro. Jac. 644. It will not be easy to reconcile all these cases, perhaps, with respect to the application of the rule of construction above mentioned; but the principle itself is recognized in each one of them, as well as in others cited in *Brown- ing v. Wright*, 2 Bos. & Pul. 13.

² 16 Johns. 110. S. P. 1 Stark. Rep. 124, *Doe v. Anderson*.

³ See *Roe v. Ashburner*, 6 D. & E. 163, and previous decisions there cited. Bac. Abr. *Leases*, &c. K; 2 Wend. 433.

⁴ *Shep. Touch.* 37; 16 Johns. 178; *Randel v. Chesapeake and Delaware Canal Company*, 1 Harrington, 154.

intended in a special or restrained sense, from inspecting the context, and looking to the effect. *Noscitur a sociis*. So that the whole and every part, as the parts are understood upon a view of the whole, have an effectual operation. This fifth is, therefore, an additional, and not a mere modifying rule—as examples will fully show.

“If I have in D. blackacre, whiteacre and greenacre, and I grant unto you all my lands in D., that is to say, blackacre and whiteacre, yet greenacre shall pass too.”¹ A case is mentioned in Savile, 71, where C. C. leased land to J. S. for twenty-one years, and covenanted that the lessee should enjoy the land for the term against “the said B. C.” It was held, that the word “said” should be rejected, because B. C. had not before been mentioned; but that the covenant was against the interruption of B. C., if there were any such person.² So where one Brooks, who owned three parcels of land—each particularly described in the deed of one Wylie conveying them to him—made a deed of conveyance, beginning his description of the land thus: “three parcels or lots situated in Portland, and bounded as follows, to wit, the first lot beginning,” &c. and setting forth the boundaries of that lot, and then closing thus—“being the same which was conveyed to me by J. Wylie, by deed dated,” &c.—all the three parcels were held to have passed by the deed;³ otherwise the words “three parcels” would have had no effect. To restrain the meaning of “three” to the *one* particularly described, would have been to contradict or destroy the word, and not to expound it. If the deed had professed to convey but one lot, the reference to Wylie’s deed might and ought to have been restrained, according to the fourth rule, to the description of the lot professed to

¹ Per Lord Hobart, Hob. 172.

² Ought not this to have been regarded as a mere clerical error—a misnaming of the lessor?

³ Child v. Ficket, 4 Greenl. 471.

be conveyed. Or if no reference had been made to Wylie's deed, the first lot only would have passed, because there would have been no means of ascertaining where or what the other two lots were; and then that part of the deed, which mentioned three lots, would have been void for uncertainty as to all but the one described—according to another rule of construction, which will be mentioned hereafter. So where the owner of a farm, which he held by two deeds, one conveying to him one undivided third part, and the other the residue thereof, made a mortgage of a tract of land described as being the same mentioned in his first deed, to which he referred for a description, and as being his whole farm; it was decided that he had mortgaged his whole farm, and not one third only; that the reference to the first deed was for description of the land, and not for the quantity of estate or interest mortgaged.¹

In *Saward v. Anstey*,² the defendant covenanted with the plaintiff to pay an annuity on an estate which he had purchased of the plaintiff, and to indemnify him. The annuity was charged on the land only, and not on the occupant, and belonged to the plaintiff's sisters. In a suit on the covenant, for not paying the annuity, the declaration did not aver that the plaintiff had been damnified. It was contended that, taken all together, the covenant was only for indemnity, and that therefore no cause of action was shown. But it was decided otherwise. For if the clause of indemnity were to limit the covenant for payment to cases where the plaintiff was himself damnified, it would wholly destroy its effect. The plaintiff could not be damnified by non-payment of the annuity. The covenant for payment must, therefore, have been intended for the benefit of others (the plaintiff's sisters) for whom he doubtless meant to provide

¹ *Willard v. Moulton*, 4 Greenl. 14; *S. P. Jackson v. Stevens*, 16 Johns. 110.

² 2 Bing. 519. See also *Co. Lit.* 146, a.

the personal responsibility of the defendant. The covenant of indemnity to himself was clearly useless.

By the construction given to the contracts, in these three instances, every part of them took effect.

The old books say that if there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received, and the latter rejected, unless there be some special reason to the contrary; but that in the case of a will containing two repugnant clauses or parts, the first shall be rejected, and the last received. "The first deed and the last will shall operate," is an ancient maxim.¹ In modern times this maxim has very little operation. A "reason to the contrary" is almost always found. The rules of construction now applied, in cases of repugnancy, give effect to the whole and every part of a will, deed, or other contract, when that is consistent with the rules of law and the intention of the party. And when this is impossible, the part which is repugnant to the general intention, or to an obvious particular intention, is wholly rejected. Parts, which were once regarded as repugnant, are now deemed consistent.

As to wills. In Owen, 84, Anderson, J., says, conformably to the old notion, "if I devise my land to J. S. and afterwards, by the same will, I devise it to J. D.—now J. S. shall have nothing, because it was my last will that J. D. should have it." This, however, is sheer technicality, and very ill applied. The whole will, and each part of it, is as much the last will, as the last clause of it. And the whole shall stand, if it be possible consistently with the testator's intentions. Contradiction and repugnancy are not to be presumed, if in any legal way a consistent meaning can be found. In the case supposed by Anderson, J., the devisees

¹ Plowd. 541; Co. Lit. 112, b; Shep. Touch. 88.

would each take a moiety of the land.¹ So where legacies are given to several persons, in different clauses of a will, if there is a deficiency of assets, all must abate proportionally, unless the testator uses language which shows a contrary intent; as, if he directs a particular legacy "to be first paid,"—or unless from his obligation to provide for a particular legatee, a contrary intent is to be inferred.

As to deeds and other contracts. In grants, &c. if words of restriction are added, which are repugnant to the grant, the restrictive words are rejected. As, if one grant all his lands, in the whole town of A, viz. in the first parish; all the lands will pass, and the *scilicet* is void. Otherwise, if the grant be of lands in the town of A, namely, in the first parish.² So if there be a demise of lands and woods, (described) except the woods, the exception is void. Or a lease for years to O. and his assigns, provided he shall not assign; the proviso is void. But if the *scilicet* or proviso be merely explanatory, and not repugnant to the grant, &c. the latter shall be limited by the explanatory clause. As in a feoffment of two acres, *habendum* the one in fee, and the other in tail, the *habendum* only explains the manner of taking, but does not restrain the gift. In these last, and similar examples, the substance of the premises is not altered.³

Whatever is expressly granted, or covenanted, or promised, cannot be restrained or diminished by subsequent provisos, restrictions, &c.; but general or doubtful clauses precedent may be distributed or explained by subsequent words and clauses not repugnant or contradictory to the express grant, covenant, or promise.⁴ Nor can subsequent

¹ See *Wallop v. Darby*, Yelv. 209; Plowd. 541, in *margins*; Swinb. Part I. § V.; Co. Lit. 112, *note* 144; 13 Mass. 535.

² Hob. 173.

³ See Hob. 172, 173; Mo. 880; Bac. Ab. *Grants*, I. 1, *Jackson v. Ireland*, 3 Wend. 99.

⁴ See *Cutler v. Tufts*, 3 Pick. 272.

words or clauses, repugnant to the express grant, demise, covenant, &c. enlarge such grant, &c. Thus, where in a lease of land for forty years, the lessor covenanted that the lessee and his assigns should enjoy the land for the term of "eighty years aforesaid," it was decided that this covenant for enjoyment did not enlarge the term; and the words "eighty years aforesaid" were rejected as inconsistent with the demise.¹ So where a rent of £20 was granted, issuing out of certain lands, *habendum* after the decease of Ann Greaves and Thomas Greaves, or either of them—the first payment to be made at a certain feast day that should first happen after the death of A. or T. Greaves—with a clause that if the rent should be unpaid at any feast day named, the grantee, at any time during the joint lives of said A. and T. Greaves, might distrain, &c., as no rent was granted during the joint lives of these persons, the words "during the joint lives," &c. were rejected as repugnant.² So where A. acknowledged the receipt of three hogsheads of tobacco in part of his claim on B., "he the said A." to be allowed per cent. the highest six months' credit price, it was held that the words "said A." should be rejected as repugnant to the clear intent of the parties.³ So in all cases, doubtless, of

¹ Savile, 71, pl. 147. See *Weak v. Escott*, 9 Price, 595.

² *Crowley v. Swindles*, Vaugh. 173. This case was decided on a demurrer to a cognizance in replevin, in which the grant was pleaded according to its meaning and effect, without mentioning the joint lives, &c. The plaintiff had oyer, and set forth the grant in *hæc verba*, and demurred. The cognizance was held good. The construction would have been the same if the grantee had claimed the rent while A. and T. Greaves were both alive.

³ *Ferguson v. Harwood*, 7 Cranch, 414. This case also was decided on a question of variance—the pleadings alleging the contract as above stated, and the contract itself being different. But Story, J., said that if the contract had been as set forth, the same result must have been produced.

The cases of *Vernon v. Alsop*, T. Ray. 68, 1 Lev. 77, 1 Sid. 105, and *Mills v. Wright*, 1 Freem. 247, come within this rule of construction—where the condition of a bond for payment of money was that the bond should be void if the money was not paid. It was wholly repugnant to the bond itself;

the erroneous substitution of one party for the other, in a written contract, where the error is manifest on inspection of the instrument. This rejection of repugnant matter can, however, be made only in cases where there is a full and intelligible contract left to operate after the repugnant matter is excluded. Otherwise the whole contract, or such parts of it as are defective, will be pronounced void for uncertainty.

In those contracts, in which the repugnancy or ambiguity is apparent on the face of the contract itself, if the repugnancy, &c. be such as renders the intention of the parties unintelligible, the contract is null and void. Parol evidence is inadmissible to explain a written instrument which contains a latent ambiguity. If the rules of construction fail to elicit the meaning, the parties are without remedy. But there are ambiguities and repugnancies which are latent, and "a latent ambiguity," says lord Bacon, "may be holpen by averment." A latent ambiguity is one which arises extrinsically in the application of an instrument of clear intrinsic meaning. As if one promise to pay John Smith a certain sum of money. This is clear on the face of the promise; but there may be many men of that name. This is an extrinsic fact, and parol evidence is admissible to show to which man of this name the promise was made. So if one devise or grant his land in D, the words are unambiguous; but parol evidence may and must be received to show the situation, extent, &c. of the land. "Parcel or not parcel of the thing demised is always matter of evidence."¹

In conveyances of land, it is often necessary to resort to extrinsic evidence of the grantor's intention. The ambiguity often being latent, evidence *dehors* the grant, &c. is

but by rejection the bond was left in full force, as an entire and perfect contract. See Finch's Law, 52; Stockton v. Turner, 7 J. J. Marsh. 192; Gully v. Gully, 1 Hawks, 20; 1 Doug. 384, per Buller, J.; 2 Atk. 32.

¹ See 3 Stark. Ev. 1000, 1026; 1 D. & E. 704.

allowed to affect its construction. The description of land can be verified or falsified, in part or in whole, by inspecting the land, and by comparing monuments, courses, distances, &c. Therefore, if the description of an estate conveyed be sufficient to ascertain what was intended to pass—though, upon examination, or upon inquiry into extraneous matter of description, the estate will not agree with some of the particulars of the description; yet it should pass by the conveyance, so that the intention may be effected. No peculiar *principle* of construction is adopted in these cases. Nor is this *application* of the common rules of construction peculiar to agreements respecting lands. In all agreements, whatever be the subject of them, when there is a latent ambiguity, the same application of the principle is made.

As conveyances of land are as frequent as almost any other species of contract, and are the frequent subject of discussion in our courts, some of the prominent rules and established canons of construction may properly be mentioned in this connection.

When the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain it, no estate will pass except such as agrees with every particular of the description. As if one grant all his land in his own occupation in the town of D, no land passes, except what is in his own occupation, and is also in that town. Every part of such grant takes effect by this construction.¹ But if the description is sufficient to ascertain the estate, although the estate will not agree with all the particulars of the description, yet it will pass. As if one convey his house in D, which formerly belonged to A. B., when it never was A. B.'s, but was C. B.'s, the house in D shall pass, if the grantor had only one house.

¹ Plowd. 191.

The description of the house in D is sufficient to ascertain the building. The intention of the parties is thus effected, and the rejected part of the deed is that which cannot operate consistently with that intention. If, however, the grantor had two or more houses in D, neither of which ever belonged to A. B., the grant would be inoperative, and void for uncertainty. But if other words of description were added, sufficient to identify the house intended, then it would pass, on the principle before mentioned, though the former owner was misnamed.¹ Thus a conveyance "of all that my farm in W, on which I now dwell, containing one hundred acres, with my dwelling house and barn thereon, being lot No. 17, &c., bounded," &c., was held to pass the farm on which the grantor dwelt, though it was not lot No. 17, and though the boundaries were mostly misdescribed.²

Where the boundaries of land described in a deed are fixed and known monuments, although neither courses, distances, nor computed contents agree therewith, the monuments must govern. Courses and distances may be erroneously taken and measured; and computation of contents

¹ *Lamb v. Reaston*, 5 Taunt. 207; *Vose v. Handy*, 2 Greenl. 322; *Roe v. Vernon*, 5 East, 51; *Doe v. Greathed*, 8 East, 91; *Bac. Ab. Grants*, H. 1; *Com. Dig. Grant*, E. 13.

² *Worthington v. Hylyer*, 4 Mass. 196. *S. P. Jackson v. Loomis*, 18 Johns. 81; 19 Johns. 449. In *Plowd.* 191, will be found the substance of the law as to the construction of grants. See also *Massie v. Watts*, 6 Cranch, 148; *Jackson v. Wilkinson*, 17 Johns. 146, and cases there cited. *Jackson v. Clark*, 7 Johns. 217. The state of titles, in Kentucky, gave rise to a course of decisions, and to the adoption of rules of construction, which evince great skill and ability in the courts, and which have nearly overcome and reduced to order the confusion formerly so embarrassing to claimants of land in that portion of the country. The most important of these decisions may be found—either made or cited by the supreme court of the United States—in *Cranch* and *Wheaton*. But as the doctrines are chiefly of local application—though not contrary to the spirit of the common law rules of construction—it seems hardly advisable to detail them in this place. See 1 *Pirtle's Digest*, 113—131.

may be inaccurate. Fixed monuments remain, and there can be no uncertainty about them. If, however, the monuments cannot be ascertained, the length of lines mentioned in the deed must govern. But there may be cases, in which it is more reasonable to suppose that there is a mistake as to the monuments referred to, than in the admeasurement of the distances, when they are found to disagree; and in such cases (which must be few) the admeasurement shall determine the boundaries, rather than the monuments.¹

If a deed of conveyance refer to a monument not in existence at the time, and the parties afterwards erect it, with the intention of conforming to the deed, the monument will govern the extent, though it do not coincide with the line described in the deed.²

Lands, granted as bounded on a river, extend to the thread of the river—*ad filum aquæ*—unless from prior grants on the other side of the river, such construction is negatived.³ And if there be an island in the river, the line will run in the same manner as if there were no island. If, therefore, the island be wholly on one side of the thread of the stream, it will belong to the owner of the bank on that side: if in the middle of the stream, it will belong in severalty, one half to each of the riparian proprietors. So of any other proportions into which the island may be divided by the thread of the river.⁴ And the law is the same in case of the accession of an island in a stream. It will belong to the owners of the banks, and they will be entitled to hold to the thread of the river and to divide it *pro modo*

¹ See Savile, 114; 2 Freem. 107. The numerous American decisions on this point are cited in 1 Metcalf and Perkins's Digest, 474.

² Makepeace v. Bancroft, 12 Mass. 469; Lerner v. Morrill, 2 N. Hamp. 197; Waterman v. Johnson, 13 Pick. 267; Kennebec Purchase v. Tiffany, 1 Greenl. 219.

³ Lunt v. Holland, 14 Mass. 149; King v. King, 7 Mass. 496; The King v. Wharton, 12 Mod. 510; 3 Kent's Com. 1st. ed. 344.

⁴ Ingraham v. Wilkinson, 4 Pick. 268, and cases there cited.

*et quantitate agrorum.*¹ Islands, however, are the subject of separate grants, and this doctrine of boundaries in grants of land bordering on streams holds only where the islands are not otherwise appropriated.

This construction of boundaries is applied only to land bordering on streams *not navigable*. By the common law, a stream, or inlet of the sea, is regarded as navigable only so far as the tide ebbs and flows. Thus far, if it can be used by water-craft to any useful purpose, it is technically navigable. All arms of the sea, coves, creeks and streams, where the tide ebbs and flows, are the property of the sovereign, as far as the ordinary high water mark: But a subject may acquire property therein, by grant, or prescription which supposes a grant.² A grant, therefore, bounding the grantee on navigable water, is construed to extend only to ordinary high water mark.

The *shore*, technically taken, is the space between low water and ordinary high water mark; and the same construction is, of course, given to a grant of land bounded by the shore.³ By the civil law, "*est autem littus maris, quatenus hybernus fluctus maximus excurrit.*"⁴ By this law, also, the property in streams *actually* navigable belonged to the sovereign, or public, though the tide did not ebb and flow therein.

This last difference in the two legal systems probably should be ascribed to the different size, &c. of the fresh-water rivers on the continent, and on the island of Great Britain. The Code Napoleon adopts the doctrine of the

¹ Vinnius, 141, (Amsterdam ed. of 1692,) Heinec. Pand. Pars vi, § 178; Heinec. Inst. Lib. II. tit. 1, § 357; Deerfield v. Arms, 17 Pick. 41.

² Davis, 55-58; 4 Bur. 2161; 2 Doug. 441; 4 D. & E. 439; 2 Bos. & Pul. 472; 5 Taunt. 705; 1 Pick. 180; 6 Johns. 133; 2 Johns. 362; 21 Pick. 344.

³ 3 Kent's Com. 1st ed. 347; Storer v. Freeman, 6 Mass. 435; Blundell v. Catterall, 5 Barn. & Ald. 294. 304.

⁴ Just. Inst. Lib. II. tit. 1, § 3; 5 Barn. & Ald. 292.

civil law. *Flumina autem omnia, et portus, publica sunt; ideoque jus piscandi omnibus commune est in portu fluminibusque.*¹ Vinnius, in his commentary on this passage (p. 126) restricts the word "flumina" to such streams as are perennial, and the "jus piscandi" to the subjects of the country "*cujus fines flumen alluit, et quatenus alluit.*"

In Pennsylvania, North Carolina and South Carolina, the civil law doctrine is adopted in regard to the *actually* navigable fresh water rivers in those states.² In Connecticut, New York, Massachusetts, and Ohio, the doctrine of the common law is adhered to.³

The owner of land adjoining on a stream not technically navigable, has, therefore, by the common law, an exclusive right of fishery *ad filum aquæ*, and may maintain a suit for a violation of this right.⁴ But the public has an easement or servitude in streams that will bear water-craft to any useful purpose; namely, a free right of passage.

The same law, as to boundaries and right of fishery, doubtless applies to cases of land adjoining small ponds. But in Massachusetts, by a colonial ordinance of 1641, "for great ponds lying in common, it shall be free for any man to fish and fowl there, and may pass and repass, on foot, through any man's propriety for that end, so they trespass not upon any man's corn or meadow." It was also provided in the same ordinance, that "every inhabitant, who is an householder, shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they

¹ Just. Inst. Lib. II. tit. 1, § 2.

² *Carson v. Blazer*, 2 Binn. 475; *Shrank v. Schuylkill Navigation Company*, 14 S. & R. 71; *Wilson v. Forbes*, 2 Dev. 30; *Ingram v. Threadgill*, 3 Dev. 59; *Cates v. Wadlington*, 1 M'Cord, 580.

³ *Adams v. Pease*, 2 Connect. 481; *The People v. Platt*, 17 Johns. 195; *Hooper v. Cumming*, 20 Johns. 90; *Freary v. Cooke*, 14 Mass. 488; *Commonwealth v. Chapin*, 5 Pick. 190; *Gavit v. Chambers*, 3 Hammond, 496.

⁴ See cases last cited, and *Waters v. Lilley*, 4 Pick. 145.

dwell, unless the freemen of the town, or the general court have otherwise appropriated them." To this privilege is however added a proviso, that no town shall appropriate to any particular person any great pond containing more than ten acres of land, &c.¹ This ordinance altered the common law in regard to the right of a several fishery in large ponds, and was designed to preserve to the people at large a favorite privilege and amusement. The effects of the ordinance are clearly perceptible at this day. As to fishing, &c. in tide waters, it seems to have been intended to restrict the right to householders in the town where the waters were. But this part of the ordinance is not at all regarded in practice, and probably was never so applied as to restrain the common law right of every citizen in those waters. Otherwise, it is believed, as to ponds.² Great ponds, that is, of more than ten acres, have in many instances become private property: But whether the owners can exclude all other persons from fishing therein, is not known to have been decided.

Although the borderers on streams not navigable own to the centre of the water, and have an exclusive right of fishery to that extent—subject only to the easement of passage on the water by the public; yet the legislature of Massachusetts have, from the earliest period, made provision for the passage of fish from the ocean into the ponds and streams above, and have subjected the owners of contiguous land, of mills, &c. to divers onerous duties—such as keeping open fish-gates on their dams, &c. And this legislative power has often been judicially recognized.³

It is a part of the law of that state (probably derived from the ordinance abovementioned,) that towns may ap-

¹ Ancient Charters, &c. 148, 149.

² See Sullivan's Land Titles, 284, et seq.; 2 Dane's Ab. Ch. LXVIII.

³ See 9 Pick. 87; Bigelow's Digest, *Fishery*. Not so in New York. 17 Johns. 195.

propriate the fishery in tide waters within their limits, if not appropriated by the legislature.¹

The right in the waters and shores of the sea, and in navigable tide waters in North America, originally belonged to the English crown. That right, to a certain extent, passed to the council, established at Plymouth in England, for the settlement of New England; and so far as it respects Massachusetts and Maine, the same right was transferred to the company which undertook that settlement; and their transfer was confirmed by the charter of Charles II. In that charter (dated May, 1628) "ports, rivers, waters, fishing," &c. were fully confirmed unto the company; and upon their establishing a government here, they took the dominion of the territory, and all its franchises and privileges, and parceled them out in small divisions. Thus the people of the colony, in their political capacity, succeeded to all the territorial right that formerly belonged to the English crown and government. As the king might grant an exclusive right to a subject, in a fishery, or in the soil under navigable waters; so the colony, succeeding to his property and power, had the same authority to make like grants to individuals, or to corporate bodies. This power, like all other powers of a kindred nature, vested in the legislature of the colony.

The ordinance beforementioned made a material change in the law on this subject of public property in tide waters. And that change has continued till the present time. For though the colony charter was annulled in 1684, by a decree in chancery, yet a new charter was granted in 1691, granting to the inhabitants of the province of Massachusetts Bay, and their successors, the territory therein described, and all "havens, ports, rivers, waters," &c. Indeed, the laws of the colony were not affected, *in fact*, by the an-

¹ Coolidge v. Williams, 4 Mass. 140

nulling of the charter—whatever might have been the strict legal theory.¹ By statutes, passed in 1692, all the local laws of Massachusetts and of New Plymouth were to remain and continue in full force, in the respective places, until, &c.²

As to shores, flats, &c. by the ordinance of 1641, "it is declared that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further"—with a proviso securing the passage of boats or other vessels over the water.³ A grant of land, therefore, "below high water mark," if not otherwise restricted, will extend to low water mark, if that be not more than one hundred rods; and if it be more, the grant will extend to that distance.⁴ So if the grant bound the grantor on a cove or creek, or on the salt water, sea, bay, &c. But the grantee cannot always claim the flats in the direction of the exterior lines of his upland, but only in the direction towards low water mark from the two corners of his upland at high water mark: As in the case of a circular cove, &c.⁵

If a grant bound the grantee upon the bank or margin of a stream, the stream itself is excluded.⁶ Low water mark would doubtless be the boundary, in such case.

When a river is the boundary between two nations, or states, if the original property is in neither, and there is no convention respecting it, each holds to the middle of the

¹ See 6 Mass. 438; 3 Amer. Jurist, 115, 241; 2 Hutchinson's History, (3d ed.) 20.

² Ancient Charters, &c. 213. 229.

³ Ancient Charters, &c. 148.

⁴ Adams v. Frothingham, 3 Mass. 352; Austin v. Carter, 1 Mass. 231.

⁵ Rust v. Boston Mill Corporation, 6 Pick. 158. See further, 6 Mass. 332; 10 Mass. 146.

⁶ Hatch v. Dwight, 17 Mass. 298.

river. But when one state is the original proprietor, and grants the territory on one side only, it retains the river in its own domain, and the newly erected state, or the old state to which the cession is made, extends only to the river; and low water mark is the boundary. This is the law in case of fresh streams, as well as in those in which the tide ebbs and flows.¹ So it was held in *Handley's lessee v. Anthony*,² on a claim to an island in the Ohio river, as part of the territory of Kentucky—the cession by Virginia describing the territory as “situate, lying and being to the northwest of the river Ohio.” If this had been a question between private citizens, grantor and grantee, the latter would have held to the centre of the river.

In the ordinance for the government of the territory northwest of the river Ohio, passed July 13, 1787, it was declared, that “the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.”³

Though, in general, the public have only an easement in the land over which a highway or road passes—as in rivers that are actually, though not technically, navigable—yet a grant of land, bounding on a highway or road, seems, in Massachusetts, to be construed to exclude the land used for a way, instead of extending to the centre.⁴ In some other states, a contrary construction is given to such grant.⁵

¹ Vattel, Book I, chap. 22.

² 5 Wheat. 374.

³ Journals of the old Congress, vol. 12, (Folwell's ed.) p. 62; 3 U. S. Laws, (Story's ed.) 2077; 5 Hammond, 414.

⁴ *Alden v. Murdock*, 13 Mass. 256; *Sibley v. Holden*, 10 Pick. 249; *Tyler v. Hammond*, 11 Pick. 213. See 17 Pick. 104; 21 Pick. 205, 296.

⁵ *Peck v. Smith*, 1 Connect. 102; *Chatham v. Brainerd*, 11 Connect. 60;

If a deed bound land on a way upon one side, this is construed as a covenant by the grantor that there is such a way; and it is not regarded as mere description.¹ But a grant bounding land on "a thirty feet street," is not held to amount to a covenant that the street is of that width throughout. It is considered as description only.² Nor is a grant of land as abutting in the rear upon a street, which was merely laid down as such upon a map, but not actually opened, an implied grant of way in such supposed street, or a covenant to open a way there, the land being accessible by a street in front.³

T. M.

Jackson v. Hathaway, 15 Johns. 454; *Cortelyou v. Van Brundt*, 2 Johns. 357; 8 Kent's Com. Lecture LI.

¹ *Parker v. Smith*, 17 Mass. 413.

² *Clap v. M'Neil*, 4 Mass. 589.

³ *Case of Mercer Street*, 4 Cow. 542.

ART. II.—ON THE EFFECT OF DRUNKENNESS UPON CRIMINAL RESPONSIBILITY AND THE APPLICATION OF PUNISHMENT.

[Translated from an article by Professor C. J. A. MITTERMAIER, in the *New Archives of Criminal Law*, volume xii. pp. 1—52.]

§ I. *Doctrine of the Roman Law.*

AN examination of the doctrine of the legal effect of drunkenness will clearly show, how little we are able to find a basis for each particular principle of the common law, in some general decision; and how carefully we ought to guard against deriving general rules from isolated fragments of the jurists or from imperial rescripts, which refer to and are founded upon particular cases. In like manner, when we examine the doctrines of the legal systems of modern times, in regard to this matter, we shall easily convince ourselves, that very little is gained by the insertion of a

general principle or two on the subject in a code ;—that the doctrine is first derived from the details of the practical administration of justice ;—and, that, where the law is defective or inappropriate, a practical remedy is not unfrequently found in bold constructions and distortions. The whole course of the development of the subject will also show, that it would be just as erroneous to lay down the principle, that drunkenness does not relieve from criminal responsibility, as it would be to assert, that the highest degree of drunkenness is always a ground of exemption from responsibility. A nice discrimination between premeditated, intentional, culpable, and inculpable drunkenness, and between the state of body induced by habitual drunkenness, and the appetite for liquor merely, can alone furnish a safe practical guide in the application of the law to particular cases. Of the truth of the assertion, that criminal laws of excessive severity, and which are not in harmony with the sound feeling of the nation, are inexpedient, because they are liable to be circumvented in all possible ways, and, by disproportionately lessening punishments, lead to an injurious extreme, the law of France affords a striking example. The penal code of that country does not mention drunkenness at all ; and, from the progress of the development of the French legislation, which will be more closely examined hereafter, it will appear beyond a doubt, that the legislator did not intend that drunkenness should in any case relieve from responsibility or free from punishment. But the reader will be convinced, when the doctrines of the existing French jurisprudence come to be noticed, in § IV, that the French courts have no scruple in acquitting a drunken person, even when guilty of the highest crimes, on the ground that drunkenness is a state of temporary insanity (*démence passagère*), and that article 6 of the penal code declares generally that insanity is a ground of exculpation.

If the inquiry be now made in what manner drunkenness was regarded in the Roman law, it will not surprise any one, who is acquainted with the spirit of the Roman criminal law, and who of course knows that it does not rest on any complete criminal code, to find that it contains no general legal provision on the subject. In the times of the old *leges*, or of the *judicia ordinaria*, the sources contain no intimation whatever of the effect of drunkenness in the application of punishment; since, according to the character of the proceedings in the *questionibus perpetuis*, the *judices* were only bound to try the truth of the complaint, and could merely acquit or condemn; and, consequently, it did not come within their functions to propose the application of any milder punishment than the *pœna legis*, or to take into consideration any ground of extenuation.¹ The apprehension, that, in consequence of this disregard of many conditions of mind, which exculpate from crime altogether, or at least diminish responsibility, unjust punishments might have been occasioned, will appear to be groundless, when it is recollected, that the *judices* in the *questionibus perpetuis* were in the situation of the English and French juries of the present day, and that, in those cases in which they regarded the legal punishment as disproportionately severe, they had it in their power to acquit altogether, as French juries not unfrequently do in cases of sacrilege and counterfeiting; and this could be done by the Roman *judices* the more readily, that they were not subject to be called to account for their sentences. It was not until the time when the *judicia extraordinaria* had been gradually introduced,—and it had thus become of no consequence even to apply the punishment determined by the old *lex*, since the judicial power had also extended

¹ On this question, see Feuerbach, in his *Revision*, i. p. 365; Besserer, *Comm. de indole jur. crim. roman.* Fasc. ii. p. 22—49; Rosshirt, *Principles of Criminal Law* (in German), p. 71.

itself to the invention of the punishment,—that we first find traces of any regard being paid, in the application of the law, to the effect of drunkenness. The principal distinction which the Roman jurists kept in view, namely, whether a crime was committed *dolo malo*, that is, with a malicious intention directed to the crime, or *ex animi impetu*,¹ was applied to the case of drunkenness; and it cannot be strange, therefore, that the jurist Marcian² should mention *ebrietas* as an example of *impetus*, thereby intimating, that a drunken person, when he commits a crime, should be equally punishable, but should not be put upon the same footing, with an offender acting in cold blood and calculating his act with clear consciousness. In other cases, where the offence was of such a nature, that, if committed without clear consciousness and a malicious intention, it would lose its injurious character and be no longer dangerous, as, for example, the offence of speaking against the government;³ or, where, by reason of drunkenness, an act, which would otherwise be a gross dereliction of official duty, becomes only a *culpa*;⁴ in these cases, drunkenness was taken into consideration. In reference to soldiers, who attempted to mutilate themselves or to commit suicide, drunkenness was regarded as a mitigating circumstance,⁵ clearly on the ground, that the reason for subjecting the suicide of soldiers to punishment, according to the Roman law, was present in those cases only where the attempt

¹ Rosshirt, in the New Archives of C. L. viii. p. 381.

² In the law 11. D. de pœnis.

³ L. un. Cod. Si quis imperatori maledixerit. The word *temulentia*, in this fragment, according to the use of the term by Roman authors, (Plinius : Hist. Nat. lib. xiv. chap. 13; Tacit : Hist. ii. chap. 68; Cicero, pro Sextio, chap. 19.) signifies drunkenness.

⁴ According to the law 12. D. de custod. reor., the keeper of a prison is subjected to a milder punishment, where a prisoner escapes in consequence of the drunkenness of his guard.

⁵ L. 6. § 7. D. de re milit.

was made with consciousness and in cold blood.¹ But the Justinianean collection contains no general principle declaring drunkenness to be a ground of exculpation in regard to all offences.

§ II. *Doctrines of the Canon and Imperial Law.*

If we may not hope to find established in the canon law, any general principle, which furnishes a binding rule for our criminal law; it is yet well known, that even in that system there are many rules, which are derived as consequences from the principle that the degree of internal guilt is to be sought after and the act judged of according to the clearness of the actor's consciousness, though these rules were often established with less reference to the secular law, than to spiritual punishments; and the strange reasons given for them sound ridiculous to one who is not accustomed to distinguish the essence from the form. Thus, in the canon law,² drunkenness is expressly mentioned as a ground which deserves the indulgence of a reasonable judge; because whatever is done in that state is done without consciousness on the part of the actor; and, besides, as God had indulgence for the offence committed by Lot while in a state of drunkenness, the clemency of the judge seems justifiable also for a further reason.³ In the imperial law, there is a single passage only,⁴ from which it appears, that, at that time, drunkenness was already regarded in general as a ground of extenuation; and, in this passage, which treats of the crime of blasphemy, the law merely follows

¹ In regard to the reason of this provision, there is still much controversy among the jurists. See Wächter in the *New Archives*, vol. x. p. 102; and Abegg, *Inquiries in the department of Criminal Jurisprudence* (in German), p. 74. in note.

² *Nesciunt quid loquantur, qui nimio vino indulgent, jacent sepulti*, says c. 7. C. xv. qu. 1.

³ c. 9. C. xv. qu. 1.

⁴ Imperial decree of 1495 concerning blasphemy, § 1.

the doctrines of the old practitioners. This silence of the Carolina will not seem strange, when it is recollected, that Schwarzenberg did not intend his work to be a complete, systematic code; but, on the contrary, turned over the application of the law to three judges (*schöffen*), to be administered according to the already generally diffused jurisprudence, which constituted the source from which he had drawn his code, and which he relied upon as the best means of supplying the deficiencies of the Carolina.

§ III. *Doctrines of the German Jurisprudence.*

It is impossible to obtain a firm foundation for the actual practice, and properly to understand the internal connection of the common German criminal law, unless we comprehend the doctrines of the Italian practitioners of the middle ages; and, in this respect, the works of Gandinus, Bonifacius, and Angelus Aretinus, are indispensable, in order to understand with what spirit particular passages of the Roman law, when that system was first applied in practice, were taken up and brought into connection with the wants and views of the people. The source of our modern criminal law is not to be found in the Roman law, as understood in its pure Roman sense, according to the results of historical investigations, but as comprehended by the practitioners of the middle ages. It is not difficult to prove, that, in general, where the Italian criminalists mention a particular principle of the law as founded in a general custom (*generalis consuetudo*), that principle is even now acknowledged in practice. Thus, in the earliest writings of the most ancient practitioners of the middle ages, we find it established as a principle, that drunkenness is a ground of extenuation. Some of these jurists announce the principle only in reference to the crime of blasphemy;¹ others of

¹ Bonifacius, tract. super malefic. p. 129 b.

them, on the contrary, as, for example, Angelus Aretinus,¹ consider this condition in a general point of view, and regard drunkenness, partly on the authority of the Roman law (l. 11. D. *de pœnis*) and partly on that of the canon law, as a ground of mitigated punishment. This doctrine remained strongly rooted in the later jurisprudence, in which a drunken person (*ebrius*) was likened to one under the influence of sleep, or drunkenness was regarded as equivalent to insanity.² It was not until the sixteenth century, that a mere general rule, in regard to drunkenness as a ground of extenuation, was felt to be insufficient; and, with the development of the scientific spirit, a more exact discrimination began to be made. Since the time of Clarus³ especially, the opinion began to prevail, that the effect of the highest degree of drunkenness was, indeed, to exempt from the punishment of *dolus*, but that the offender was still subject to the punishment of *culpa*, except in two cases, namely: first, when he inebriated himself⁴ intentionally, and with a consciousness that he might commit a crime while drunk; and, secondly, when he became intoxicated without any fault on his part, as, for example, in consequence of inebriating substances having been mingled with his wine by his comrades. In the first of these cases, the drunkenness was not allowed to be any ground of exculpation at all; while, in the other, it had the effect to relieve the offender even from the punishment of *culpa*. At this time, also, the different kinds of drunkenness began to be accurately distinguished from one another, and that only was permitted to have an influence, which deprived the subject of it of the use of reason.⁵ These

¹ Angelus Aretinus, de maleficiis, p. 111.

² Gomez, var. resolut. res. iii. cap. i. nr. 73; Farinacius, prax. qu. 93, nr. 1; Decianus, tract. crim. l. ii. cap. 6; Tiraquell, de pœnis temp. caus. 6; Mascardus, de probat. concl. 94, lib. i, nr. 4.

³ Clarus, prax. crim. quæst. 60. nr. 11.

⁴ Foller, prax. rer. crim. in Blanci pract. crim. p. 805.

⁵ Majorani, Opopraxis Judic. crim. p. 158.

views gradually determined the German practice,¹ though with manifold distinctions, which, certainly, were sometimes more subtle than practically significant, as, for example, the distinction between *ebrius* and *ebriosus*.² In Germany, especially, these doctrines found a decided entrance; and the testimonies of Gail,³ Carpzov,⁴ and Böhmer,⁵ who follow substantially the opinion of Clarus, leave no doubt whatever on the subject. The more indulgent opinion, in regard to the influence of drunkenness, prevailed also in the practice of Italy,⁶ Spain,⁷ Portugal,⁸ Holland⁹ and the Netherlands.¹⁰ It seems the more striking, therefore, that, in three states of Germanic origin, namely, France, England, and Scotland, the doctrine in reference to this matter should have developed itself in a direction precisely the opposite of that sanctioned by the German practice. But this fact will seem less strange, when it is recollected, that, already in the middle ages and even in the sixteenth century, some jurists,—setting out with the principle, that drunkenness is in itself a punishable offence, and, that those who commit offences while in a punishable state deserve no exculpation, and also that it would be attended with too great danger to society, to attribute a mitigating power to drunkenness, which can so easily be pretended as a cloak for crimes,—established the doctrine, that drunkenness in no case excul-

¹ Damhouder, *prax. rer. crim.* cap. 84; a Bavo, *theorica criminal. Ultrajecti*, 1696. p. 254.

² Matthæi, *de crim. prolegom.* cap. 2. p. 33.

³ Gail, *Observ.* ii. obs. 110.

⁴ Carpzov, *prax. rer. crim.* P. i. qu. 45. nr. 57. P. iii. qu. 146. nr. 30

⁵ Böhmer, *Med. ad C C C.* ad art. 179. § 9. p. 869.

⁶ Cremani, *elem. jur. crim.* i. p. 46; Renazzi, *elem. jur. crim.* i. p. 99; Carmignani, *elem. jur.* i. p. 56.

⁷ Asso y Manuel, *instituciones del derecho civil de Castilla*, Pars. ii. p. 171.

⁸ Mellie Freisii, *inst. jur. crim. lusitan.* p. 4.

⁹ v. Linden, *regtsgeleerd practical handboek*, p. 203.

¹⁰ Ghewiet, *inst. du droit belge*, vol. ii. p. 330.

pated from the ordinary punishment.¹ These views, strengthened by the principle of intimidation, which, in former times, was allowed to prevail over that of justice, operated in France and England the more readily, by reason of the fact, that, in those countries, the manners of the people were far more opposed, than they were in Germany, to the practice of drunkenness. Thus, in France, an ordinance of Francis I. of Aug. 31, 1536, chap. 3. art. 1, declared, that drunkenness should not in any case absolve from the ordinary punishment; and, this principle was sanctioned and applied by the French jurisprudence.² Similar views prevailed in England, and the doctrine laid down by the classical Hale,³ which regards drunkenness as a *dementia affectata*, determined the opinions of the later English jurists;⁴ though the sound understanding of these writers compels them to admit, that drunkenness diminishes the responsibility, and produces an exemption from punishment, when intoxication takes place without the fault of the drinker, as when it results from the act of other persons, or when a real insanity is induced by habitual drunkenness. In England, as is well known, the Roman law found no entrance; and this fact explains the more readily why the indulgent doctrine founded in the law 11, D. *de pœnis*, which prevailed in the rest of Europe, could not extend itself there. In Scotland, where the Roman law obtained great influence, similar reasons to those advanced by the English jurists seem, notwithstanding, to have prevented the introduction of the milder principle.⁵

¹ See these views already in Baldus, ad l. 1. Cod. unde vi. See also Bizardus, additions to Clarus, nr. 39. ed. of Geneva, 1739. vol. ii. p. 469.

² Despeisses, arrets ii. tit. 12. p. 1. nr. 4; Jousse, justice criminelle, part. ii. p. 618; Lois et institut. coutum. part. ii. p. 352.

³ Hale, History of the Pleas of the Crown, book i. chap. 4. vol. i. p. 32, London, 1778.

⁴ Blackstone, Commentaries, vol. iv. p. 25; Russell, Crimes and Misdemeanors, i. p. 7.

⁵ Hume, Comm. on the law of Scotland respecting crimes, vol. i. p. 44. He

An example of the more severe legislation occurs also in an ordinance of Charles V. for the Netherlands, according to which drunkenness was never allowed to release from the ordinary punishment;¹ and, in Germany, too, there are not wanting severe ordinances, in the enactment of which the law-givers have suffered themselves to be guided more by their indignation and a desire to deter from crime than by the principle of justice. To this class, belong a Hanoverian law of Dec. 5, 1736, and a Bavarian law of July 6, 1756,² which provide that drunkenness shall be no ground of exculpation. But the fate of all disproportionately severe penal laws has also followed these ordinances; the Netherland ordinance soon came to be very little followed in practice;³ and, in Germany, the better practitioners soon came to the conclusion, that the ordinance ought not to apply to that highest degree of drunkenness, which deprives the individual of all use of understanding.⁴

§ IV. *Modern Legislation.*

The doctrines of the modern legal systems of Germany remain true, essentially, to the old German practice; but the manner, in which these doctrines are expressed, depends upon the character of each particular code. In the Prussian Landrecht, which does not profess to give a complete enumeration of all the grounds for the removal of accountabil-

remarks, that the passages in the Roman law, relating to this subject, refer only to particular cases, and, consequently, admit of no extension.

¹ Damhouder, *prax. rer. crimin.* p. 322.

² According to the *Cod. Maxim. Bavar.* of 1751, part i. chap. i. § 19, a distinction is to be made between cases, in which the drunkenness is without fault, and wholly deprives of the use of reason, and those, in which the fault is great, or the intoxication only moderate. In the first, no punishment at all is incurred.

³ Ghewiet, *Droit Belgique*, ii. p. 330.

⁴ In reference to the Hanoverian law, see Spangenberg, in the late edition of Struben's *Juridical Reflections*, (in German), iii. p. 53.

ity, it is not strange, that we find nothing more than a general intimation concerning drunkenness,¹ from which, however, so much may be concluded, that where it has its origin in gross fault, the punishment of fault only is to be inflicted for a crime committed therein;² and, in the annals of Prussian criminal justice, we find that even where a father in a drunken fit killed his child, the offender was only punished by one year's imprisonment.³ The Bavarian code also contains no general rule in regard to the punishment of an offence committed by a drunken person, though, in articles 120 and 121, it undertakes to enumerate all the grounds which exempt from responsibility. But this omission is only a seeming one, inasmuch as the general expression, "inculpable disorder of the senses or of the understanding," in article 121,⁴ includes drunkenness.⁵ The code does not expressly provide that inculpable drunkenness shall be punishable as *culpa*, but this results from the principles established in relation to *culpa* generally. When, however, the drunkenness is intentional, and the offender has put himself in that condition for the purpose of committing the crime, the code declares expressly that it shall be no ground of exculpation.⁶ On the other hand, drunkenness in a less degree is conceived of in too narrow a manner, when the law⁷ speaks of it as a ground of extenuation only in reference to homicide, and thereby seems

¹ Prussian Landrecht, part ii. tit. 20. § 22.

² See Hitzig's Journal for Prussian Criminal Law, (in German) no. 22. p. 599.

³ Hitzig's Journal, no. 5. p. 60.

⁴ This article declares, that "the act is unpunishable, when it is committed in inculpable disorder of the senses or of the understanding, in which the actor is not conscious of his act, or of its punishableness."

⁵ According to the remarks on the criminal code, i. p. 304, there can be doubt upon this point. See also Feuerbach, Account of remarkable criminal cases, ii. p. 697.

⁶ Bavarian Code, art. 40.

⁷ Bavarian Code, art. 152.

to exclude the judge from allowing it to avail in other crimes. The Austrian code,¹ without distinguishing between culpable and inculpable drunkenness, considers complete intoxication, when not brought upon one's self with a view to the crime, as a ground of exculpation from responsibility.

Wholly different from this view is that of the French legislation. In the present penal code of France, drunkenness is not mentioned at all; and, as article 66 declares expressly, that no crime can be excused but upon some ground of exculpation acknowledged and provided in the law, it would seem, that, by the French law, drunkenness is not in any case a ground of relief from the ordinary punishment; which is not difficult to understand, when it is recollected, that, as has already been observed, the earlier doctrines of the French jurisprudence in regard to drunkenness did not allow it to have any mitigating effect.² For the first years after the publication of the code,³ this severity of doctrine, in consequence of a servile adherence to the letter of the law, combined with the operation of the principle of intimidation, which reprobated all exculpation on account of drunkenness, was rigidly maintained in the French courts.⁴ But by degrees, the milder view prevailed also in France; the severity of the French legislation was

¹ Of 1803, § 2. lit. c. See Jenull, *Austrian Criminal Law*, part i. p. 138; also, Albertini, *Penal law in force in the Lombardo-Venitian Provinces*, Venice, 1824, p. 26.

² See Merlin, *Repertory*, vol. iv. p. 910.

³ According to the law of the 27th Germinal, year iv, a question was to be put to the jury, at the request of the accused, precisely in the same manner as in reference to other mitigating grounds, whether the offence was committed in a state of drunkenness, and drunkenness was allowed to avail as a ground of mitigation. Dalloz, *Jurisprudence of the nineteenth century*, vol. xiv. p. 315.

⁴ On this ground, the decisions of October 15. 1807, and May 18, 1815, are to be explained. Sirey, *Collection*, vol. viii. p. 24; vol. xv. p. i. p. 398.

found fault with; greater freedom was demanded for the judge, to enable him to consider drunkenness as a ground for moderating punishment;¹ and the writers on the subject soon went further, and undertook to show, that, according to the existing law, an offence committed in a state of real drunkenness, which was not intentional, ought not to be punishable in the same degree as a premeditated crime.² These opinions³ sometimes found their way into the courts themselves; and the admission of drunkenness as a ground of extenuation was justified by the penal code, on the ground, it was asserted, that drunkenness produces a temporary insanity, and that according to article 64 of the penal code, every kind of insanity, without distinction, is a ground of exculpation.⁴ It cannot be strange,⁵ therefore, that for some years juries in France have admitted drunkenness as a ground of exculpation, and have accordingly pronounced verdicts of acquittal.⁶ Inasmuch as juries⁷ are not liable to be called to account for their ver-

¹ See Bavoux, *Preliminary Lectures on the Penal Code*, p. 567; Robillard, *Considerations on the institution of the public ministry*, Paris, 1821, p. 189—195.

² Dufour, in an article in the *Themis*, vol. i. p. 108.

³ Dalloz, also, in his *jurisprudence of the 19th century*, vol. xiv, p. 314, laments the deficiencies of the code, in reference to drunkenness. He distinguishes drunkenness into habitual, premeditated, and accidental, and is of opinion that the last ought to be a ground of extenuation.

⁴ Collmann, *Theory of Criminal Law*, p. 103; Ardesch, *ad articulum 64 Codicis pœnalis*, Lugd. 1824, p. 33—37.

⁵ Among the French writers, the most correct views on the influence of drunkenness are to be found in Rossi, *Treatise on Penal Law*, vol. ii. p. 188.

⁶ See, for example, a case of March 18, 1826, in Georget's dissertation in the General Archives of Medicine, for April 1826, vol. x, p. 519; also a case in the *Gazette of the Tribunals*, for 1826, nr. 839, in which the jury declared of a drunken man: "he is guilty, but he has acted without discernment and without will." See also Esquirol, in the translation of Hoffbauer, *Legal medicine*, &c. p. 240.

⁷ In the German provinces, in which the French criminal law is still in force, the juries are more severe than they are in France; and the old opin-

dicts, and the question put to them, "is the accused guilty," requires them to decide upon the guilt of the accused, it becomes still easier to understand these acquittals. It is only to be lamented, that the idea of the so-called omnipotence of juries not seldom leads them into error; and that their desire to divert the ordinary punishment of the law from an offender induces them to pronounce a verdict of not guilty; so that one who has committed an offence in the highest drunkenness is wholly freed from punishment, when he has well deserved the punishment of *culpa*.

In the most recent publications of a legislative character, there is also a great diversity of opinion in regard to drunkenness. The Netherlands project of a criminal code, of 1827, article 33, declares, that where the drunkenness is accidental or involuntary, it is, but where it is premeditated or voluntary, it is not a ground for moderating or exempting from punishment. In the revised project of Bavaria, of 1827, article 67, the words of article 121 of the criminal code of 1813 are retained, with the exception of the word "inculpable;" while, on the other hand, the project of Baron von Strombeck¹ does not mention drunkenness expressly, but yet speaks of a transitory, inculpable condition, arising from an entire disorder of the senses, or from a defective activity of the reason. The Hanover project, article 99, retains the words of the Bavarian criminal code, but adds thereto expressly, "namely, in cases of the highest degree of inculpable drunkenness;" and, then, in article 109, number 6, it mentions drunkenness generally among the grounds for moderating punishment.² The Zurich pro-

ion, which allows no influence to drunkenness as a ground of mitigated punishment, seems to continue. See the Annals of Justice in Rhine-Bavaria, by Hildgard, Deux Ponts, 1830, no. 4. p. 274.

¹ Project of a Criminal Code for a North German State, by Von Strombeck, article 120.

² Bauer, Remarks on the Bavarian project, i. p. 540.

ject of 1829,¹ declares that one who intentionally commits a legal injury, while in a state of inculpable drunkenness of the highest degree, is punishable in the same manner as if he were under age. The criminal code of Luzerne² mentions inculpable drunkenness as a ground of exemption from responsibility.

§ V. *Principles for the Determination of the Imputability in cases of Drunkenness.*

It cannot in any degree correspond with the demands of science, to analyze all the possible cases of the existence of drunkenness, in the commission of crimes, and to assign to each its proper rule; and, if we seek for a principle, which shall be easily applicable to all possible cases, we shall find, that the principle of imputability in general is the only one, which can properly be applied in cases of drunkenness. The conviction is gradually becoming more and more prevalent, that the principle of freedom is an insufficient foundation for criminal responsibility.³ It is quite true, indeed, that freedom, as the fundamental power of the mind, must be supposed in every degree of imputability, because, without it, imputability is impossible; but, yet, no guiding principle is thereby given to the judge, which will enable him to decide upon the condition, in reference to which imputability may be asserted; for every offender has freedom, and by his own fault and choice is brought into that state of mind, in which he chooses the crime as a means of gratifying his passions; and the drunken man, even, becomes so through the exercise of his own freedom, since, by a proper presence of mind and a strong will, it is in his power to avoid intoxication.

¹ Article 159.

² Of 1827, § 3.

³ See the modern discussions of this subject in Weber's *Anthropology*, p. 294; Clarus, *Contributions to the knowledge and judgment of doubtful conditions of the mind*, (Leipsic, 1828) pp. 8—19; Jarcke, in *Hitzsig's Journal of the administration of criminal law*, no. 21. p. 129 and following.

It is equally unsatisfactory, to inquire whether the actor has the use of his understanding, or, according to another view, the use of his reason; for, independent of the vagueness and uncertainty resulting from the different senses in which these expressions are used, we do not obtain a strong and clearly cognizable test, by determining whether the drunken man has the use of understanding or of reason.¹

In reference to imputability, the only proper inquiry is, whether the actor, at the time of the act, (and, as it were, of himself,) possessed a consciousness of his act and its consequences, and its relation to the law; and where this consciousness is wanting, imputability ceases. The law considers every one responsible, when he knows what he wills to do according to its effect, and is in a condition to subsume the act under the law; because, when these conditions exist, the actor may then be withheld from the act, by his inward sense of its not being permissible, and by the legal prohibition to commit it, of which he has full knowledge; and, if he, notwithstanding, commits the act, it shows that he wills to do that which is known to him to be forbidden. But this consciousness, which is the condition of imputability, is obliterated in one who is in a state of complete drunkenness. In consequence of the physiological operation of drunkenness on the bodily organization, and the consequent increased circulation of the blood, the ordinary nervous activity is disturbed; the accustomed series of ideas is interrupted; the consciousness of the external world is darkened; images and phantasies, which arise in the soul after the manner of dreams, and which the calm consideration of the external world, in a sober state, would teach to be unreal, become overpowering; and the unbridled imagination gives to the flow of these images a strength, which hinders the operation of the accustomed

¹ Jarcke, as above cited, p. 152.

ideas,—creates a disorder of the soul,—and, in the excitement of the nervous system, effects a delusion of the drunken man, while, at the same time, it lends a power to the appetites arising from these eccentric images, which the deterring representations of reason are unable to surmount. The drunken man loses the consciousness of the external world; the friend, whom in his sober mind he loves, is now regarded as an enemy, in whose every even the most innocent look, he imagines he reads a threat; it is no longer in his power to refer what he wills to do to the law, for the voice of reason is silent for him; he no longer knows what he does; and he consequently acts without responsibility, because he acts without consciousness.

If it be maintained, on the contrary, that, in every case of drunkenness, the individual has brought himself into that state with his own free will and through his own fault; that even whilst in that condition there is some though a dim degree of consciousness still remaining; that drunkenness is itself a punishable condition, and, consequently, that when it leads to crime, it ought not to be made the ground of exculpation;—the answer is, that this reasoning rests upon a manifold confusion of ideas; and, above all, the question, whether drunkenness is itself punishable, is confounded with the question, whether an act committed in this state should be subjected to punishment. The first may be decided in the affirmative, in so far as police punishment is in question, which may be provided in the case of drunkenness, when it manifests itself to the public scandal;¹ but the second question, on the contrary, can only be answered in the affirmative, with several dis-

¹ There is a very great difference between one, who gets drunk every day in his chamber, and sleeps off the fit in his own house, and one, who staggers about the public streets in a drunken state,—exhibits a disgusting spectacle,—and insults the passengers.

tinctions: (a) there are cases in which an offence committed in drunkenness is unpunishable, because no imputability exists; (b) there are other cases in which an offence committed in this condition can only be imputed as *culpa*; (c) and other cases, in which the circumstance of drunkenness does not hinder the application of the full punishment of the crime intended. In how far these distinctions are well founded, will be more closely considered in the course of this discussion. Drunkenness is not in every case a culpable condition, and on that account to be visited with the ordinary punishment; for, as will easily be shown hereafter, there are very many cases, in which it may be regarded as wholly inculpable; and, even in those cases, in which it is the result of the drunken man's own fault, it cannot be said that he foresaw and desired the crime therein committed; we cannot, indeed, in such a case, absolve him from the reproach of *culpa*, but it does not therefore follow, that he is to be looked on in the light of a voluntary offender, committing an offence with a bad intention; for, in the fit of drunkenness itself, the subject of it possesses no consciousness of what he is doing, and, before it commences, he does not in general know the consequences that will result from it,—he does not know, that the enjoyment of intoxicating drink will put him into such a state of excitement as to incline him to crime,—he may trust the discretion which has hitherto approved itself sufficient through his whole life,—and, even at the moment, when drunkenness commences, we cannot charge him with an imputable intention, on the ground, that as soon as he feels the approach of intoxication, he ought to stop drinking; for, as we learn from experience, there is no such certain, perceptible step, which marks the transition from sobriety to drunkenness; a single glass more changes the ordinary temper of the drinker from the calm to the passionate; and this change takes place so suddenly and so unper-

ceived by him, that he cannot be said to be thrown into such a state of passion with his own free will and consent.¹ The opinion of Escher,² therefore, who asserts that where the drunken person is not impotent to commit the crime in question, the idea of punishment may operate upon him through his habitual association of ideas; and, consequently, that an offence committed in a fit of drunkenness ought to be punished in the same manner as a *dolous* crime, is not just: for, if we consider the nature of drunkenness, we shall find that it consists, either, *first*, in an entire disorder of the senses; or, *second*, in a bodily condition, in which a morbid excitement of the nervous and muscular systems irresistibly impels the drunken man to violent acts; or, *thirdly*, the effect of drunkenness takes the character and is similar to that of delirium, in which phantasies of the imagination obtrude themselves with such liveliness, as to overpower the understanding of the drunken man, who, being thereby prevented from seeing into the deception, holds the images and fantasies in his mind as true, and conducts himself accordingly. But in neither of these conditions, can it be said that the idea of punishment continues to operate; for, in the first, there is no clear idea of any thing; in the second, the reason is too feeble to control the morbid excitement, which is also complicated, in a greater or less degree, with disorder of the senses; and, in the third, responsibility ceases altogether, precisely as in regard to the acts of the insane. From the fact, therefore, that a drunken man has power notwithstanding to commit crime, no conclusion can be drawn as to his responsibility, for he acts in the same manner as a madman, or insane person.

It is equally erroneous to assert, as is often done, that an

¹ Rossi, *Treatise on Penal Law*, vol. ii. p. 188.

² Escher, *Dissertation*, p. 220.

offence committed in a state of drunkenness is similar to one committed in a passion ; for, if we compare these two conditions, we shall soon observe, that passion has an internal and drunkenness an external cause.¹ One, who is subject to the influence of passion, has yielded to his strong feelings, and allowed them a dominion over his life, which denies or weakens the deterring representations of the law ; it is through his own fault, that the angry man becomes inflamed with rage, since he might have withstood the first movements of his passion ; and, besides, every fit of passion has its root more or less in a previously existing appetite or passion, and a crime committed therein is always in a greater or less degree the product of premeditated selfish motives. When an angry man kills his enemy who has injured him, in this case, there are circumstances preceding the passion, which excite to crime, and which are conflicting, in the soul of the actor, with the idea of the wickedness of the act, and of the punishment provided by the law ; while a drunken man, on the contrary, commonly acts without reference to the relations which precede his drunkenness, and kills perhaps his best friend, who merely endeavors to withstand the outbreak of his fury.

He who acts in a passion is always obnoxious to the reproach of fault, since the passion excited in the particular case is only the product of an already existing disposition of soul, in consequence of the actor's having too frequently yielded to his passion, and lost command over himself. He is justly liable to the reproach of fault, too, for the further reason, that he is not only acquainted with his own propensity to get in a passion, but he also knows what are the consequences of anger, which, in its very nature, leads to the doing of evil to those by whom we have been injured ; whereas drunkenness may be wholly inculpable, as, for ex-

¹ *Romai, Treatise*, vol. ii, p. 489.

ample, when one does not know the intoxicating quality of the liquor by which he is made drunk ; neither is drunkenness in itself a condition, which makes every drunken man inclined to commit crimes, for it frequently induces a remarkable serenity of temper ; and it may be, that the drunken man, from his former experience of himself, knows that he is perfectly harmless and peaceable when drunk, and is therefore inclined to look upon the condition of drunkenness with feelings of indifference. It cannot be said, either, that the drinker ought not to have drunken ; for drinking in itself is not forbidden, and is frequently occasioned by some sudden change or extraordinary circumstance, of which the drinker himself is not conscious ; and drunkenness may even arise from a condition of calmness and social enjoyment, which is far from blameable. If we compare an offence committed in a fit of passion with one committed in a state of drunkenness, the distinction cannot escape observation, that in passion there is always some degree of consciousness remaining, and that the actor knows what he is doing, and its consequences, and hears the deterring voice of the law ; whilst drunkenness renders the subject of it unconscious of his actions, and, in so far, constitutes a condition analogous to that kind and degree of mental disorder, which excludes imputability. From the foregoing considerations, it is easy to conclude, that the opinion of those, who would make an offender responsible in the same degree and punishable in the same manner for a crime committed in drunkenness as for one committed in a sober condition, is wholly groundless.

§ VI. *On the different Forms of Drunkenness.*

In order to the formation of a correct judgment in the particular cases, in which the drunkenness of the offender is alleged as a ground of exculpation, it is necessary to con-

sider : (1) the different degrees of drunkenness ; (2) the manner in which it originated ; (3) the kind of offence therein committed ; and (4) the individuality of the actor.

I. In reference to the different degrees of drunkenness, it has been attempted in modern times to delineate the different periods of intoxication,¹ and to designate its several gradations, according to the distinctions presented by the ordinary use of language.² But, life, in the never ending fulness of its combinations, mocks every attempt to bring all possible cases within certain sharply defined classes ; the different degrees flow into one another ; it will always be discretionary whether a given case shall be placed in the first or second degree. It is not to be denied, too, that the temperament of the drinker will have an influence upon the determination of the degree.³ A passionate man, who is inclined to anger, will perhaps have his passions aroused by the lowest degree of drunkenness, which, in a man of a mild and peaceful temper, only has the effect to compose the feelings, so that other persons, who do not know him intimately, merely perceive a change in him ; and, in this case, the drunkenness must be adjudged to be of the highest degree, though if the subject of it were a person of an ordinary temperament, it could only belong to the second.⁴

¹ Hoffbauer, *Psychology*, in its application to the administration of justice, p. 276.

² Henke, *Dissertations*, vol. iv. p. 243 ; Heinroth, *Manual of the disorders of the spiritual life*, vol. ii p. 272 ; Clarus, as above cited, p. 111 ; Weber's *Anthropology*, p. 451 ; Feuerbach, *Reports of remarkable criminal cases*, vol. ii. p. 691.

³ Weber, as above cited, p. 454.

⁴ Feuerbach (l. c. p. 688.) very properly warns against the adoption of any absolute principles in reference to the succession of the degrees of drunkenness. There are some individuals, who, when they are once excited by the use of intoxicating liquor, are very quickly reduced to a state of unconsciousness, by the enjoyment of a single additional glass, while there are others, who remain conscious of their acts, even when their physical powers already indicate the consequences of drunkenness.

In graduating a scale of degrees of drunkenness, it is most proper to consider only the manner, in which the consciousness is thereby affected; and, in so far, it is not inappropriate, in the general, and as an aid in forming a judgment of the influence of drunkenness on criminal responsibility, to distinguish three degrees. The lowest degree, in which the liquor enjoyed only promotes a quicker circulation of the blood, and thereby increases the nervous activity, produces no change in the consciousness of the act, and of its being permitted or punishable by the law. The subject of drunkenness in this degree is only clearer and more excitable than common; but his intellectual powers remain in their normal equilibrium, and the use of his understanding is not diminished. His responsibility is in no respect changed or diminished, any more than is that of one, who, in a burst of joy on the receipt of some pleasing news, does a light-minded and wanton act. In drunkenness of the second degree, in consequence of the stronger pressure of the blood, and of the increased nervous irritability thereby produced, the feelings rise to the state of passion; the imagination has already gained the upper hand, and fills the mind with unreal images; and the increased excitability of the drunken man deceives the clearness of his consciousness, which, in the middle degree of drunkenness is not generally destroyed. This degree is characterized by striking expressions and actions, which we are not accustomed to observe when the subject of it is sober; whilst he is still master of his actions, and, by his whole deportment, shows that he is conscious of what he is doing. It is evident, therefore, that in drunkenness of this degree, we cannot consider responsibility as at an end; but, on account of the deceived and confused consciousness, it is just, that there should be a diminution of the punishment for crimes committed in this condition. Drunkenness in the highest degree, on the contrary, is characterized by such an entire loss or disorder of

the consciousness, that the drunken man is no longer conscious of what he is doing, or, at least, of the consequences of his actions, and their reference to the law. In the powerful excitement of the imagination, occasioned by this degree of drunkenness, there is the same flow of ideas as in dreaming; or, certain ideas, which take possession of the mind of the drunken man, become so strong, that he is unable to detect their want of reality; and, in consequence of the nervous excitement and diseased sensation occasioned by the vehement pressing of the blood to the brain, wild appetites arise, whose true character the drunken man is as little able to perceive, as his reason is to govern them. Hence, in reference to the particular crime committed by the drunken man, imputability ceases; because consciousness as the condition of imputability does not exist. It is proper to add, however, that the highest degree of drunkenness operates in many persons in such a manner, that the drunken man often manifests a coherence of expression, and a kind of systematic intention, in his violent or criminal act, which lead to the belief that he still retains the use of his understanding; while a more careful consideration shows, that even in such a case, there is no imputability, since, in many instances, the mind of the drunken man is possessed by a certain delusion, which it holds for real, and upon which his acts are predicated; and, in other cases, in which the individual is in the state of the highest drunkenness, a morbidly excited appetite impels him with such irresistible force, that though he acts systematically with a view to gratify his desire, he is still in such a state of disorder, that he does not perceive the guilt of what he is doing.

II. In reference to the manner in which the drunkenness has originated, the following distinctions may be made:— (1) It may be intentionally induced, in order to the commission of a crime while in that state; (2) it may result

from drinking without any intention to become drunk, and without any belief, on the part of the drinker, that drunkenness is likely to ensue; (3) it may arise without any intention to become drunk, and without reference to a crime to be committed therein, though the drinker might have easily foreseen, that under the existing circumstances he would have become drunken. The legal consequences of these distinctions will be more closely examined hereafter.

III. In regard to the nature of the offences¹ committed while in a state of drunkenness, three kinds are to be distinguished, namely:—(1) offences, which require a certain degree of preparation and an internal idea of systematic action, and which, being of a selfish character, can only be committed with consideration, such as theft and counterfeiting; (2) offences, which consist in certain expressions, indicating the dangerousness or internal corruption of the offender's mind, or a disposition to do wrong to others, as, for example, injuries, blasphemy, and seditious speeches; (3) offences, which consist in violent acts and are committed in a sudden ebullition of passion. In reference to offences of the first kind, the existence of drunkenness in the highest degree can scarcely be supposed, since the consideration which belongs to the crime is not compatible with that want of consciousness, which is essential to the highest degree of drunkenness. In such cases, therefore, drunkenness in the second degree more often comes in question; but it is necessary also to take into consideration the whole deportment of the offender. He, who takes a thing, which he knows does not belong to him, with an intention to steal it, is not exempt from punishment, even though his courage has been elevated, or his appetite inflamed, by drunkenness of the first or second degree, provided his subsequent conduct, after the drunkenness has passed away, as, for ex-

¹ Clarus, as above cited, p. 116.

ample, when he neglects to give back the thing, shows that the *animus lucri faciendi* was present at the time or was superadded afterwards; whilst, on the other hand, drunkenness comes into consideration, when a person in the highest degree of drunkenness takes the thing of another, without knowing that he does so, or without knowing that the thing is the property of another, as, for example, when he throws away the thing in a drunken fit, or, when, by giving it back after the intoxication is over, and he becomes conscious of his fault, he shows that he had no intention to appropriate it. In offences of the second kind, there is no responsibility whatever, since, without consciousness, no criminal direction of the will, as, for example, the *animus injuriandi*, is possible; and the verbal declarations of a drunken man not only occur as the products of a condition in which the will exercises no restraint, but, in the mouth of such a person, whose condition is visible to every body, cannot be the means of injury. Still, in this class of cases, also, the responsibility of the offender often depends upon preëxisting personal relations, as, for example, when a drunken man utters injuries against his enemy; or upon his subsequent conduct, as, for example, when, upon becoming sober and being informed of the injurious speeches and required to recall them, he refuses to do so. In crimes of the third kind, the highest degree of drunkenness comes chiefly into consideration in the case of an act, which, if committed by a sober man, would be punishable as murder or criminal wounding. In such a case, the drunkenness has the effect to do away with the character of premeditation, which would otherwise belong to the act, and, according to the circumstances, to reduce the punishment to that of an act committed under the impulse of passion, or even to render the offence punishable only as a fault (*culpa*).¹

¹ In many offences, the nature of the act committed precludes the supposition of the existence of the highest degree of drunkenness in the offender,

IV. The individuality of the actor comes into consideration, (a) in so far as he is a man, who is in general inclined to crime, and gives himself up to it on the least occasion, or, on the other hand, is a thoroughly blameless and just person; (b) in so far as he is an habitual drunkard, and has sufficient knowledge of the consequences which result from that condition; (c) in so far, as, during his drunkenness, he gives proof of the continuance of consciousness, and, by the means which he makes use of, the adaptation of his acts to a definite purpose, and by the preparations already made for the crime in the first stages of his drunkenness, shows that he knows what he is doing, and is conscious of the motives by which he ought to be deterred; (d) in so far as the drunken man, while the offence is yet incomplete, receives timely warning, and is consequently in a situation to perceive the criminal character of his undertaking.

§ VII. *Culpable Drunkenness.*

From what has already been mentioned in § III, it is manifest, that the doctrine, according to which an offence committed in the highest degree of unintentional drunkenness is imputable as *culpa* only, (where there are no particular grounds also for relieving the offender from that imputation), may be considered to correspond to the doctrine of the German jurisprudence.¹ There are also internal grounds, derived from the essential nature of imputability, which speak in favor of the truth of the same doctrine. The drunken man is on the same footing with one, who, without any intention to commit an offence, im-

because a person intoxicated in that degree would not possess the physical power necessary to the commission of the offence, as, for example, rape.

¹ See the citations in the notes on p. 296, in § III, and also Theodorici colleg. theoret. pract. crim. Disp. 7. thes. 7; Quistorp, Principles, § 95; Meister, Principia, § 117; Martin, Criminal Law, § 39; Jarcke, Manual, part i. p. 175.

properly puts himself in a condition, which, as he cannot fail to know its danger, he might easily and ought to have avoided. In the same manner, that, when one goes with a burning light into a barn and sleeps there, or playfully shoots at another with a gun, of which he does not know whether it is loaded or not, we consider the criminal act which results from such carelessness as a *culpa*; and in the same manner, that, when a pregnant woman suffers the birth of her child to take place in secret, and thus puts herself in a helpless condition, we impute the death of the child to her as a *culpa*;—so, in the same manner, a drunken man is obnoxious to the reproach of *culpa*, when he commits an offence in that condition; since he might have avoided falling into it, and, according to common experience, he could not have been ignorant, that a drunken man is no longer master of himself, and is against his will impelled to acts, which in a sober state he would not have committed.

The doctrine of Tittmann,¹ that drunkenness does not inculcate, but that when not intentionally induced, it is unimputable, because the crime committed does not stand in connection with the criminal intent, is inadmissible; because such a connection certainly does exist, at least, indirectly,² since the disposition of will to commit the offence is the consequence of the excitement produced by the drunkenness, and the drunken man cannot be ignorant that by drinking he will put himself in a condition in which he will be dangerous to other persons.³ It is difficult to determine what drunkenness is to be considered as culpable. We often hear it asserted, that drunkenness, even when it is

¹ Tittmann, Manual of Criminal Jurisprudence, part i. § 87; Gans, also, in his critical exposition of the Hanoverian project, p. 229, considers it essential to inquire whether the drunkenness is culpable.

² Feuerbach, Compendium of Criminal Law, 10th edition, § 57.

³ Moltzer, de causis a reo allegandis, quæ doli præsumt. elidunt, Lugdun. 1810, p. 86.

not induced with a view to the commission of an offence, is wilful, and consequently culpable, inasmuch as the drunken man wilfully resorts to the means by which he becomes drunk; and, as drunkenness arises only gradually and by degrees, the drunken man by a timely giving up of his liquor might escape all further danger; but, on the other hand, it must be taken into view, that in regard to the consequences of drinking, no absolute principle can be established; that there are persons who can drink thirty measures of liquor and still remain sober and discreet, whilst the majority of others are made drunk by the sixth part of that quantity; that persons in liquor conduct themselves very differently, and while one quietly sleeps off his intoxication, another diverts himself and others by his jokes, and a third gets into the greatest rage and destroys every thing within his reach; it must also be considered, that, in regard to the consequences of drunkenness, so much depends upon accidental contemporary circumstances, that it is only by means of morbid affections on certain days, or in consequence of raillery and contradiction, which the drunken man is subjected to by others, or from the circumstance that he comes immediately into the open air, that he becomes inclined to the commission of crimes, whilst on other days and under different circumstances, the same quantity of liquor would have no such effect upon him. For these reasons, it cannot be said, that every drunkenness is culpable, merely because the drinker must have known that he would become drunk. According to another opinion,¹ in order to decide whether the condition is a culpable one, it is only necessary to inquire whether the party, on the day on which he committed the offence, drank immoderately. This view may be admitted, provided the sense of it is that it is to be ascertained, whether the party, on that day, drank

¹ Feuerbach, Reports, &c., if. p. 697.

more than he was accustomed to drink without becoming drunk. If one, who, for example, is accustomed every day to drink eight measures of beer, and to become thereby only somewhat brighter, without losing his consciousness, take only six measures on some particular day, and in consequence of certain accidental circumstances occurring on that day, he is thereby reduced to a degree of drunkenness, which, under other circumstances, would not have taken place; such drunkenness ought not to be considered as culpable. It is manifest, that the question of culpability must be decided according to the individuality of the person. He, who does only what he is regularly accustomed to do, provided it be a thing in itself permitted, is free from fault; for he cannot foresee that he will become drunk, and consequently in a situation in which he will be dangerous to others. But when one drinks more than he is accustomed to drink, as, for example, when one, who is accustomed to drink six measures daily and to remain sober, drinks seven or eight, and becomes drunk, an offence committed by him in that condition is imputable to him as *culpa*; for, since he does not restrain himself to his accustomed quantity, he has no ground of exculpation in his favor, but stands upon the same footing with every other drinker, who can and ought to know that drunkenness follows from a free indulgence in strong drink. On the other hand, those go too far, who consider the drunkenness inculpable, where the party is accustomed to the use of liquor and to become intoxicated, but, when drunk, remains peaceable and quiet and indisposed to quarrel; for such a person notwithstanding wilfully puts himself in a dangerous condition, in which he knows that he no longer retains his consciousness, and in which for that very reason he is no longer his own master; and his experience, that his drunkenness has not thus far been followed by any unhappy consequences, is just as little entitled to be considered a ground of exculpation, as

that of one, who, trusting in his often proved skill in shooting, shoots at a wild beast which happens to be very near a man, and, by his carelessness, kills the man.

In order, therefore, to decide properly upon the existence of culpability in the condition of drunkenness, a careful inquiry, with a view to the following particulars, is necessary: (1) how much is the party accustomed to drink without becoming drunk; (2) how does he behave himself when drunk,—is he of a nature which inclines him to quarrel, or does he remain peaceable; (3) whether, on the day when he committed the offence, he was operated upon by particular circumstances, as, for example, vehement anger, by which he was very much excited; (4) whether the disposition to commit the offence was not gradually induced, by the raillery or particular excitement of other persons, who, perhaps, desired the commission of the offence; (5) whether the offence is a consequence of those illusions of the senses or morbid fancies, which arise from drunkenness;¹ (6) or whether it is accompanied by morbid affections and an insane condition, in which there is a disorder of the senses; (7) whether the drinker had not previously had melancholy experience of the passionate disposition into which he is brought by the use of intoxicating drink; (8) whether, before he had become fully drunk, he had not been warned of his danger by others, and requested to abstain from further drinking. It is by a reference also to these particulars, that the degree of *culpa*, as well as its existence, must be determined.

§ VIII. *Intentional Drunkenness.*

The doctrine, that, where an offender has intentionally intoxicated himself, in order afterwards to have it in his

¹ This principle is established in the case mentioned by Feuerbach, (as above cited) vol. ii. No. xii.

power to call upon the condition of drunkenness as a ground of exculpation, a crime committed by him in that state should be punishable as *dolous*, must be admitted to be correct, when it is considered, that in such a case the criminal intention is immediately directed to the crime actually committed; that the crime seems so much the more to be committed wilfully, for the reason, that even during the drunkenness, the mind of the offender is constantly directed towards it; and that the condition upon which the offender's competency to responsibility depends exists, inasmuch as the drinker, who wills to commit the crime, still has consciousness enough, and is consequently in a situation, to recognize and be operated upon by the deterring motives of right and of law. In regard to the principle, which ought to regulate the punishment in these cases, opinions are still divided. The Bavarian criminal code, § 40, inflicts the ordinary punishment upon a crime committed in a state of intentional drunkenness.¹ Oersted² approves of this provision; while Kleinschrod³ and Stelzer⁴ are of opinion, that a less punishment ought to be applied, where one in the highest degree of drunkenness commits a crime upon which he had not previously resolved; because, at the time of the commission of the act, the drunken man was not competent to the use of reason. Stübel⁵ thinks it important to inquire, whether the offender commits the precise crime which he had in view, or a different one. But, in order that a correct judgment, in regard to this matter, may be possible, it is necessary, in

¹ The revised project, § 60, retains this provision only where the intended crime is actually committed, but, in other cases, admits of a lesser degree of responsibility.

² Principles of Criminal Law, p. 247.

³ Kleinschrod, Systematic Development, part i. p. 224.

⁴ Stelzer, On the Will, p. 312.

⁵ Stübel, in the appendix to my tract on the most recent state of criminal legislation, p. 40.

the first place, to distinguish accurately the several cases that may occur. It is important to determine: (1) whether one has resolved to commit a particular crime, as, for example, to murder A, and in order to give himself courage, or to prepare himself before hand with the excuse of drunkenness, becomes intoxicated; or (2) whether being in a very excited state, but without as yet having formed an intention to commit a crime, he, in a fit of ill humor, as, for example, when he has been insulted by another, drinks excessively, and at last in his drunkenness commits a crime, to which he was already inclined by his previous excited state; (3) whether, during the gradual progress of the drunkenness, the commission of a crime already previously resolved upon has not been hastened by the intervention of causes, which, in general, have the effect to excite the party,—as, for example, where one, having resolved to kill his enemy in the evening, drinks excessively in order to give himself courage, but receiving new injuries in the afternoon by which he is very much excited, strikes down his adversary immediately; (4) it is important to ascertain, whether the offence committed is of a nature and kind different from that previously resolved upon,—as where one becomes intoxicated in order to commit a rape upon A, but, in his drunkenness, kills B; (5) or, whether the crime committed is only a higher degree of that intended, as, for example, where one intoxicates himself for the purpose of inflicting a severe wound upon A, and then in the fit of drunkenness kills him.

The application of the punishment must be governed by considering whether the crime actually committed in the fit of drunkenness stands in such a connection with that previously resolved upon, that the former can be regarded as wilful and intentional, and that the previously formed criminal intent can be referred to the crime committed. This is evidently true in the first of the above mentioned

cases, and we can have no hesitation whatever in inflicting the ordinary punishment for murder upon the offender. In the second, on the contrary, there is no particular criminal resolution; the inward storm is first raised to its highest pitch by the drunkenness; the crime cannot be considered as committed with fully continued consciousness, since there was no strong resolution existing, which could continue to operate; the passion is first excited to its highest degree by the liquor, and, consequently, the punishment must be reduced to that for an offence committed in a fit of passion, moderated still further by reason of drunkenness. In the third case, the same may be said; the excitement which takes place during the progress of the drunkenness, receives such an increase of power by reason of the exaltation of the physical state thereby induced, that it impels to the commission of the crime; in this case, we know, indeed, that the drinker willed to commit a crime, and that he actually committed one; but we do not know, whether he would actually have done so, had it not been for the violent excitement into which he was thrown; and, in doubt on this point, we cannot consider the crime to be committed with premeditation. In the next case, the crime committed must be judged of according to the principles established in § VII, and consequently be punishable as a *culpa*, since the previous consciousness refers to a wholly different offence, and the inclination to the crime actually committed is only the result of the excitement produced by the drunkenness. In the fifth case, on the contrary, the crime committed would be imputed to the offender as intentional; for, he who uses certain means in a certain manner, from which he cannot but know that the most grievous as well as the slightest consequences may result, and who intentionally puts himself, by means of drink, in a condition in which he is no longer master of himself, and is consequently unable to

judge of the effect of what he does, must be regarded as consenting to all the consequences of his acts.

§ IX. *Unpunishable Drunkenness.*

As a consequence of the principle, that a crime committed in a state of culpable but not intentional drunkenness is imputable only as a *culpa*, the liability to punishment ceases altogether when the drunkenness is inculpable. This is the case, (1) when one drinks only moderately, that is, does not exceed his common measure of liquor, the enjoyment of which is not usually followed by intoxication, but the highest drunkenness notwithstanding ensues, in consequence of the properties of the liquor being changed by other persons, against his will and without his knowledge, as, for example, by mingling therewith highly intoxicating ingredients; as the drinker cannot know of this change in the quality of his liquor, he cannot of course foresee that he will become intoxicated by the enjoyment of it, and must therefore be held free from fault. The same is the case, (2) when one drinks under circumstances, whose extraordinarily intoxicating operation he is ignorant of; as, for example, A is accustomed to drink two measures of wine without becoming intoxicated, but going into a wine cellar, where a great quantity of liquor is fermenting, and there drinking two measures, it may easily happen that he becomes intoxicated, without being able to foresee the influence of the place. So, (3) where one drinks immoderately, knowing that he will thereby become drunk, the drunkenness may notwithstanding be considered as inculpable, when the drinker takes measures beforehand to prevent all danger from it to other persons, though these measures prove fruitless, by reason of extraordinary accidents, which cannot well be foreseen;¹

¹ Stelzer on the Will, p. 314.

as, for example, when one, who knows his own weakness, drinks excessively, but charges his servant beforehand, as soon as the drunkenness becomes manifest, to confine him immediately in a retired chamber; if, now, the servant by accident runs away and leaves his master in a state of drunkenness, and strangers come in and a quarrel ensues in which the drunken man kills one of them, the drunkenness must be considered as inculpable; because the drinker has taken every precaution to guard against a dangerous outbreak, and it is contrary to his expectation, and by the fault of another, that the accident takes place. Drunkenness may also (4) be regarded as inculpable, when it occurs under circumstances, in which it is only through a coöperation of many concurring relations, as morbid affections, particular excitements by other persons, jeering, &c., that a quantity of liquor, which, in the absence of these relations, would not give rise to the highest drunkenness, produces that effect upon the drinker. The characteristic of fault ceases, too, (5) when the drunkenness is the result of disease, as will be explained hereafter.

§ X. *Ebriosity.*

It is necessary, also, in this place, to say something of *ebriosity*,¹ by which we understand that condition which gradually results from the excessive use of intoxicating liquors, and is characterized by certain abiding effects. This condition, in reference to offences committed by inebriates, comes into consideration in a twofold respect: (1) in so far as they actually intoxicate themselves, and therein commit crimes; (2) in so far as they commit crimes, when not in the state of true drunkenness. The habitual use of intoxicating liquors produces by degrees certain permanent

¹ Clarus, as above cited, p. 118.

effects, in reference to the physical and mental powers ; the inebriate becomes gradually insensible to moral impressions ; his nervous system becomes morbidly affected ; and thence results either a moral obtuseness, manifesting itself in a stupid brutality, and only relieved for the moment by the use of stimulating drink, or a condition of extraordinary irritability, which breaks out upon every even the slightest occasion, and frequently in the most brutal manner.¹ The inebriate, therefore, even when not under the immediate influence of liquor, seems to be in an abnormal condition, in which the mental powers are morbidly disturbed and changed ; and witnesses called to testify to the condition of such persons, observing that they conduct themselves differently from others, frequently pronounce them to be insane, and thus the judge may easily be led into error. But even when the inebriate actually drinks and becomes intoxicated, it is important to understand, that he falls into the condition of entire drunkenness * far easier than other persons ; that also the highest drunkenness far sooner makes its appearance, and frequently assumes a more violent and dangerous character, and is not seldom connected in the so called second period of intoxication with an entire extinction of consciousness.

If we now apply these observations to the question of responsibility for offences, the following principles result. (1) Mere ebriosity, without actual drunkenness, is not of itself any ground of exculpation or moderation. The judge must be governed, in reference to the responsibility of an offender, by the existence of consciousness on his part ; and neither the stupidity of an inebriate, nor his increased irritability, destroys his selfconsciousness as an actor, or his consciousness of the act and its illegality ; because even the moral

¹ Frotter, on Drunkenness and its Influence upon the human body. Translated with remarks by Hoffbauer. Lemgo, 1821.

* Clarus, as above cited, p. 127.

perversion and the increased excitability to crimes, which result from ebriosity, are only the selfculpable consequences of the immoderate enjoyment of spirituous liquors, and are not entitled to any greater influence upon the question of responsibility, than the general condition of one, who, by early sensual indulgencies, has injuriously affected his powers of body and mind. (2) An exception to this principle can only be admitted, either when a real insanity already exists in consequence of the ebriosity (§ XI); or when the ebriosity is connected with certain morbid affections of the mind, which are first thereby brought to light;¹ or when violent passions, as anger, operate upon the inebriate, and, in a manner which tends very much to diminish his consciousness, carry up the excitability to its highest pitch; in all which cases, there is good ground for moderating the punishment. (3) If the inebriate actually intoxicates himself, and, in his drunkenness, commits a crime, the drunkenness must infallibly be regarded as culpable, because he cannot be ignorant how easy it is for him to become intoxicated, and how dangerous his intoxication is; but, even in this case, the greatest foresight is necessary on the part of the judge; for, as the inebriate is habitually accustomed to drink, and, consequently, does not regard the condition of drunkenness as an extraordinary one; as his consciousness is greatly enfeebled, and he consequently does not so clearly perceive the wrongfulness of his acts; and as, finally, the inebriate is more liable than others to become drunken in the highest degree, even when he drinks but little; so the ebriosity, under certain circumstances, may be a ground, either for considerably reducing the degree of culpability, or for removing it altogether, provided the drinker has not drunken immoderately.

¹ For example, the case cited in Hitzig's Journal, No. 5, p. 60.

§ XI. *Mental diseases connected with Drunkenness. Appetite for intoxicating drink. Delirium tremens.*

In the foregoing section, we have intimated that a condition, highly prejudicial to the physical and mental powers, may be induced by habitual drunkenness.

I. If these effects are of such a nature and extent as to destroy the consciousness which is the condition of responsibility, the mental disease which results therefrom must be regarded as a ground of irresponsibility. Against this view, however, a writer highly deserving of the science of legal psychology has expressed an opinion, which cannot be passed by without notice. Heinroth¹ undertakes to prove, that every mental disease is culpable, and, consequently, that an offence committed therein is imputable as *culpa*. This author considers an insane person as on the same footing with one who is drunken, and as he looks upon every kind of insanity as culpable, it is easy to understand, that he must also regard him as punishable, who knowingly puts himself into the condition of insanity by means of drunkenness: but we cannot give our assent to this opinion;² for, in the first place, if, in reference to mental diseases, it were really true that they are always culpable, this culpability would only be a moral one, and certainly not practically applicable; secondly, for the reason that experience teaches that the greater part of mental diseases arise only from corporeal affections; and, lastly, that even where moral causes can be shown, it cannot be said, that the existence of the disease is to be placed to the account of the sinfully culpable condition. But, in reference to drunkenness, as the cause of mental disease, it must be mentioned, that even

¹ In Hitzig's Journal, No 15, p. 136.

² See, also, in opposition to Heinroth's doctrine, an article by Jarcke, in Hitzig's Journal, No. 23, p. 106.

in the case of an offence committed by an insane person, if it can be shown that the offender was already previously ebrious, he cannot be considered as legally culpable; because the culpability of which we here speak is only a moral, but not a legal one, on the ground, that the drinker might certainly have foreseen that his ebriosity would at last terminate in insanity. When insanity results from drunkenness, it is always an extraordinary circumstance; the drinker sees hundreds of his acquaintances daily drink as much as he himself does; he sees that they sleep off their intoxication, and are then as well as before; he knows, perhaps, that his grandfather and father have often been drunk, but, notwithstanding, lived to a great age, without becoming insane; it cannot, therefore, be asserted, that the drinker might and ought to have foreseen that he would become insane. Many persons become insane, in consequence of selfpollution early practised, or in consequence of other sensual indulgencies, but yet no one thinks of holding such persons legally responsible for criminal acts. There is no doubt, also, that it may be proved by medical observations, that even in cases where ebriosity is followed by insanity, it is not the only cause of the disease, which, on the contrary, may be owing to the operation of many other physical affections and causes.

If we have thus far considered an offence as unpunishable, when committed by one in a state of insanity resulting from ebriosity, we hold it also to be our duty, to warn the judge not to suffer himself to be deceived by many phenomena which occur as the consequences of ebriosity; in particular, we observe in some inebriates an extraordinary irritability, which is not unfrequently denominated by the physicians a morbid irascibility (*exandescencia furibunda*); others, on the contrary, are subject to convulsion fits; but the most common consequences of ebriosity are the so-called hallucinations, which manifest themselves by illusions of

the senses, as, for example, when the inebriate imagines he hears voices, or believes he sees objects before him, which do not really exist. None of these conditions is sufficient to render the subject of them irresponsible for his criminal acts; for they are either signs of a perverted moral sense, in which the inebriate gives himself up to his lusts upon the slightest occasion, or they are morbid corporeal affections, which do not destroy his consciousness, and consequently leave him responsible for his acts. Hallucinations must be distinguished into two kinds: (1) those which are proper illusions of the senses,¹ as, for example, the consequences of diseased organs of hearing and sight; and (2) those which result from a morbid excitation of the imagination.² In regard to the first, the understanding always retains sufficient power to distinguish the illusion from the truth; whilst the second appear as the first manifestations of an outbreak of insanity, or as its certain forerunners, and, as such, may either wholly put an end to or very much diminish the offender's responsibility.³

II. An appetite for liquor,⁴ which irresistibly impels one to drink, may be regarded as a proper diseased condition, which it is necessary to distinguish into two kinds. (1) The first kind is that which results from ebriosity, the effects of which, in the inebriate, have reached the highest degree.⁵ In this kind of liquor appetite, in consequence of a diseased

¹ Clarus, l. c. p. 136.

² In reference to hallucinations of the imagination, see the remarks of Esquirol in the notes to the French translation of Hoffbauer's *Legal Medicine*, p. 85.

³ See also on the subject of hallucinations, Horn's *Archives of Medical Practice*, 1825, May number, p. 532; Grohmann in *Friederich's Magazine*, (für Seelenheilkunde,) No. 4, p. 123.

⁴ Brühl Cramer, on the Appetite for Liquor, Berlin, 1819; Henke, *Dissertations*, vol. iv, p. 253; Vogel, *Contributions to the Doctrine of the Competency to Imputability*, p. 171.

⁵ Clarus, *Contributions*, p. 127.

state of the digestive organs, and the defective quality of the nourishment afforded by them, a morbid irritability arises, which is characterized¹ by an irresistible impulse to relieve the exhausted nervous activity by means of strong drink, and manifests itself habitually and constantly, or periodically. This kind of appetite is a culpable one, and a criminal act committed therein is imputable as *culpa*; but, as has been remarked in regard to ebriosity, in this case, and in a yet stronger degree, the culpability may fall so low as to disappear altogether; though the liquor-appetite seems not to be a true insanity which relieves from responsibility, since it is only a form of bodily disease, in which the diseased person always retains a consciousness of his acts. (2) Different from this is the liquor-appetite,² which without any connection with ebriosity, but as the consequence of a diseased digestive system and a disordered stomach, manifests itself by an irresistible impulse to cool the burning thirst by means of strong drink. Persons, laboring under this form of disease, when the paroxysm is not on them, abhor every kind of strong drink, and are moderate and mild; but by drinking are easily wrought up to the highest pitch of excitement. This kind of liquor-appetite is not culpable, but most nearly resembles the condition (the existence of which is very much controverted by some) of *mania sine delirio*.

III. Lastly, we are accustomed to speak of *delirium tremens*³ as a particular form of disease; and, it is undoubtedly true, that as a consequence of ebriosity, a state of insanity or madness may arise, which is characterized by a violent trembling, and thence has received its name, but which is only to be distinguished from other mental disease by its cause or occasion. On the contrary, it is going too far, as is

¹ Clarus, Contributions, p. 128.

² Esquirol, as above cited, p. 244.

³ Henke, Dissertations, vol. iv. p. 277; Vogel, Contributions, p. 173.

sometimes done, to consider the convulsive trembling, which often occurs in connection with mere ebriosity or liquor-appetite, as *delirium tremens*, and to regard it as proof of a mental disease already existing in the inebriate. For the criminalist, it is only important to inquire,¹ whether the condition of the inebriate carries in itself the signs of a true mental disease, which is characterized by an absence of the consciousness of the actor, or whether the phenomena are only the consequences of corporeal suffering, without the consciousness of the actor being thereby affected. In the first case only is the disease a ground of exculpation, and in the second it relieves from responsibility precisely in the same manner as other bodily affections may do,² when they exert an influence upon the mental activity, so long as this influence falls short of that degree of strength, in which the consciousness of the actor is entirely destroyed.

¹ See also Heinroth, *System of Psychological Medicine*, p. 263; Clarus, *Contributions*, p. 142.

² Jarcke, in *Hitzig's Journal*, No. 23, p. 87.

ART. III.—BENTHAM'S THEORY OF LEGISLATION.

Theory of Legislation; by JEREMY BENTHAM. Translated from the French of ETIENNE DUMONT, by R. HILDRETH. In two volumes 12mo. Boston: Weeks, Jordan & Co. 1840.

IN an article published some time since (vol. xx, p. 332,) under the head of the "Greatest-Happiness-Principle," we took occasion to express our opinion of the celebrated author of the theory of legislation, in his threefold character of a philosopher,—an exposé of existing abuses,—and a legislative reformer. In the work before us, he appears in the

first and last of these characters, but chiefly in the last. The principle of utility, as it is called, is laid down and practically applied as the basis of legislation. The theory of legislation is considered under three divisions, namely : principles of legislation,—principles of the civil code,—and principles of the penal code. The principles of the civil code are treated of in three parts, 1, objects of the civil law ; 2, distribution of property ; and, 3, rights and obligations attached to certain private conditions. The principles of the penal code are examined in four parts, 1, of offences ; 2, political remedies against the evil of offences ; 3, of punishments ; and, 4, indirect means of preventing offences.

This treatise was compiled and arranged from Bentham's manuscripts, by Dumont, who performed the part of a sort of literary *accoucheur* to his distinguished friend, by rendering his works into French, and ushering them into the world. The principles of legislation, which are first treated of, and which make the foundation of the civil and the penal codes, are all embraced in the one general principle of utility, or the greatest happiness of the greatest number. In the article above alluded to, we have already expressed our opinion regarding the truth and value of this principle as a principle of action ; and have stated it as our belief, that the greatest happiness of the greatest number ought not to be considered as the ultimate end and object of human government and laws. In the same article, we also mentioned the remarkable fact, that Bentham himself, towards the close of his life, repudiated the greatest-happiness-principle, as wanting in that clearness and correctness, which had originally recommended it to his notice and adoption. The reasons for this change of opinion are given at length in the first volume of the *Deontology*, which was compiled and published after Bentham's decease, by his English editor, Bowring. How far this change of opinion, on the part of the author, would have

induced him to modify the principles which he originally founded upon it, it is impossible for us now to say ; but the fact must be considered at least to render their value somewhat doubtful. Agreeing as we do with Bentham, in his last opinion, we shall not undertake to criticise the work before us, any further than simply to show from it, what it was, which, in the mind of the author, constituted the greatest happiness of the greatest number,—or, in other words, to give a definition of the principle of utility.

It is clear, that the truth of the principle, which makes the greatest happiness of the greatest number the governing principle of action, must depend upon the idea we have of happiness ; and we can scarcely doubt, that a great majority of our readers will have little difficulty in coming to a just conclusion, when they are informed that Bentham regarded happiness as synonymous with the mere personal gratification of the individual, independent of all considerations of right or duty. The following extracts from the principles of legislation will show that we are not mistaken in this matter.

“ I am a partisan of the *principle of utility* when I measure my approbation or disapprobation of a public or private act by its tendency to produce pleasure or pain ; when I employ the words *just, unjust, moral, immoral, good, bad*, simply as collective terms including the ideas of certain pains or pleasures ; it being always understood that I use the words *pain* and *pleasure* in their ordinary signification, without inventing any arbitrary definition for the sake of excluding certain pleasures or denying the existence of certain pains. In this matter we want no refinement, no metaphysics. It is not necessary to consult Plato, nor Aristotle. *Pain* and *pleasure* are what every body feels to be such—the peasant and the prince, the unlearned as well as the philosopher.

He who adopts the *principle of utility*, esteems virtue to be a good only on account of the pleasures which result from it ; he regards vice as an evil only because of the pains which it pro-

duces. Moral good is *good* only by its tendency to produce physical good. Moral evil is *evil* only by its tendency to produce physical evil ; but when I say *physical*, I mean the pains and pleasures of the soul as well as the pains and pleasures of sense. I have in view man, such as he is, in his actual constitution."

"This principle [the ascetic] is exactly the rival, the antagonist of that which we have just been examining. Those who follow it have a horror of pleasures. Every thing which gratifies the senses, in their view, is odious and criminal. They found morality upon privations, and virtue upon the renouncement of one's self. In one word, the reverse of the partisans of utility, they approve every thing which tends to diminish enjoyment, they blame every thing which tends to augment it."

"The philosophical party never reproved pleasures in the mass, but only those which it called gross and sensual, while it exalted the pleasures of sentiment and the understanding. It was rather a preference for the one class, than a total exclusion of the other."

"Every one makes himself the judge of his own utility ; such is the fact, and such it ought to be ; otherwise man would not be a rational agent. He who is not a judge of what is agreeable to him, is less than a child ; he is an idiot."

Among pleasures, Bentham enumerates,

"*Pleasures of Sense.* Those which can be immediately referred to our organs independently of all associations, viz. the pleasures of *taste*, of *smell*, of *sight*, of *hearing*, of *touch*, especially the blessing of *health*, that happy flow of spirits, that perception of an easy and unburdensome existence, which cannot be referred to any of the senses in particular, but which appertains to all the vital functions ; finally the pleasures of *novelty*, those which we experience when new objects are applied to our senses. They do not form a separate class, but they play so conspicuous a part, that it is necessary to mention them expressly."

"*Pleasures of Power.* Those which a man experiences who perceives in himself the means of disposing others to serve him

through their hopes or their fears ; that is, by the fear of some evil, or the hope of some good which he can do them."

"*Pleasures of Malevolence.* They result from the sight or the thought of pain endured by those beings who do not love us, whether men or animals. They may also be called *pleasures of the irascible passions, of antipathy, or of the anti-social affections.*"

Among pains are enumerated,

"*Pains of Malevolence.* These are the pains we experience at reflecting on the happiness of those we hate. They may also be called *pains of antipathy, pains of the anti-social affections.*"

The following extracts are equally clear.

"The whole system of morals, the whole system of legislation, rests upon a single basis, and that basis is, the *knowledge of pains and pleasures*. It is the only foundation of clear ideas upon those subjects. When we speak of vices and virtues, of actions innocent or criminal, of a system remuneratory or penal, what is it that we speak of? Of pains and pleasures, and of nothing else. A reason in morals or politics, which cannot be translated by the simple words *pain* or *pleasure*, is an obscure and sophistical reason, from which nothing can be concluded.

You wish for example, to study the subject of offences,—that great object which directs all legislation. This study, at bottom, will be nothing but a comparison, a calculation, of pains and pleasures. You consider the *criminality* or the *evil* of certain actions,—that is, the pains which result from them to such and such individuals; the *motive* of the delinquent,—that is, the expectation of pleasure, which led him to commit the action in question; the *advantage* of the offence,—that is, the acquisition of pleasure which has resulted from it; the *legal punishment* which ought to be inflicted,—that is, what pain the guilty person ought to undergo. It thus appears that the theory of pains and pleasures is the sole foundation of all knowledge upon the subject of legislation."

"The sole object of the legislator is, to increase pleasures and to prevent pains; and for this purpose he ought to be well acquainted with their respective values. As pleasures and pains are the only instruments which he employs, he ought carefully to study their power."

"The inclinations of a man being known, we can calculate with tolerable certainty the pleasure or the pain which a given event will cause him."

"When that desire to which nature has intrusted the perpetuation of the species attacks the security of the person, or of the domestic condition, the good which results from its gratification cannot be compared to the evil it produces."

"The pleasure of acquiring by a violation of another's rights, with the pain which such a proceeding occasions, will not prove to be equivalents."

"Let a beggar, pressed by hunger, steal from a rich man's house a loaf, which perhaps saves him from starving,—can it be possible to compare the good which the thief acquires for himself, with the evil which the rich man suffers?"

"If the pleasure which attends the satisfaction of such powerful desires as hatred, the sexual appetite, and hunger, when that satisfaction runs counter to the interests of others, is not equal to the pain which it causes, the disproportion will appear much greater, as respects motives less active and strong."

"Morality, in general, is the art of directing the actions of men in such a way as to produce the greatest possible sum of good."

"It has been the object of this introduction to give a clear idea of the principle of utility, and of the method of reasoning conformable to that principle. There results from it a legislative logic, which can be summed up in a few words. What is it, to offer a *good reason* with respect to a law? It is, to allege the good or evil which the law tends to produce; so much good, so many arguments in its favor; so much evil, so many arguments

against it; remembering all the time, that good and evil are nothing else than pleasure and pain."

We are willing to leave it to our readers to decide, for themselves, what value is to be attributed to a work, which professes to test the propriety of all laws, by their tendency to gratify the greatest number of persons, in a community, in any manner, in which those persons desire to be gratified, without the slightest regard to considerations of right and wrong, or to the principles of moral and religious duty. We are only astonished, that the translator, distrusting the *principle of utility* as the foundation of morals, should have been willing to admit it as "the only safe rule of legislation." It is hardly necessary to add, for the information of those who know Mr. Hildreth, that the translation is admirably executed. We have rarely seen a French work so well *done* into English.

L. S. C.

ART. IV.—RIGHTS OF THE SLAVEHOLDING STATES AND OF
THE OWNERS OF SLAVE PROPERTY UNDER THE CONSTITUTION
OF THE UNITED STATES.

No. 2.

WHEN the Virginia convention were considering whether they would assent to and ratify the federal constitution, Mr. Madison, amongst other things, said, "it is worthy of our consideration that those who prepared the paper on the table, found difficulties not to be described in its formation—mutual deference and concession were absolutely necessary. Had they been inflexibly tenacious of their individual opinions, they would never have concurred. Under what circumstances was it formed? when no party was formed or particular prepossession made, and men's minds were calm and dispassionate. Yet, under these circum-

stances, it was difficult, extremely difficult, to agree to any general system."¹

The members of the Virginia convention were nearly equally divided upon the question of ratification, and the opposition embraced a very considerable proportion of the talent of the state. Amongst the opponents, there were none more decided or more zealous than George Mason and Patrick Henry.

When the section, declaring that the importation of such persons as any of the states might think proper to admit, should not be prohibited by congress prior to the year 1808, was under consideration, Mr. George Mason said, "As much as I value an union of all the states, I would not admit the southern states² into the union, unless they agreed to the discontinuance of this disgraceful trade; because it would bring weakness and not strength to the union. And though this infamous traffic be continued, we have no security for the property of that kind which we have already. There is no clause in this constitution to secure it; for they may lay such tax as will amount to manumission."

Mr. Madison answered these objections as follows: "I should conceive this clause to be impolitic, if it were one of those things which could be excluded without encountering greater evils. The southern states would not have entered into the union of America without the temporary permission of that trade. And if they were excluded from the union, the consequences might be dreadful to them and to us. We are not in a worse situation than before. That traffic is prohibited by our laws and we may continue the prohibition. The union in general is not in a worse situation. Under the articles of the confederation it might be continued forever, but by this clause an end may be put to it after twenty years. There is therefore an amelioration of our

¹ Elliott's Debates, vol. ii, p. 450.

² By southern states was meant South Carolina and Georgia.

circumstances. A tax may be laid in the meantime, but it is limited, otherwise congress might lay such a tax as would amount to a prohibition. From the mode of representation and taxation, congress cannot lay such a tax on slaves as will amount to manumission. Another clause secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws. For the laws of the states are uncharitable to one another in this respect. But by this constitution 'no person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.' This clause was expressly inserted to enable owners of slaves to reclaim them. This is a better security than any that now exists. No power is given to the general government to interpose with respect to the property in slaves now held by the states. The taxation of this state being equal only to its representation, such a tax cannot be laid as he supposes."¹

Patrick Henry endeavored to support the objection that if the constitution were adopted, congress might abolish slavery. "As much," said he, "as I deplore slavery, I see that prudence forbids its abolition. I deny that the general government ought to set them free; because a decided majority of the states have not the ties of sympathy and fellow feeling for those whose interest would be affected by the emancipation. The majority of congress is to the north, and the slaves are to the south. In this situation, I see a great deal of the property of the people of Virginia in jeopardy, and their peace and tranquillity gone away. I repeat it again, that it would rejoice my very soul that every one

¹ Elliott's Debates, vol. ii, p. 335, 6.

of my fellow beings was emancipated. As we ought with gratitude to admire that decree of heaven which has numbered us among the free, we ought to lament and deplore the necessity of holding our fellow men in bondage. But is it practicable by any human means, to liberate them without producing the most dreadful and ruinous consequences? We ought to possess them in the manner we have inherited them from our ancestors, as their manumission is incompatible with the felicity of our country. But we ought to soften as much as possible the rigor of their unhappy fate.”¹

Mr. Henry was answered by governor Randolph: “I ask,” said he, “and I will ask again and again, until I be answered, (not by declamation) where is the part that has a tendency to the abolition of slavery? Is it the clause which says that ‘the migration or importation of such persons, as any of the states now existing shall think proper to admit, shall not be prohibited by congress prior to the year 1808.’ This is an exception from the power of regulating commerce, and the restriction is only to continue till 1808. Then congress can, by the exercise of that power, prevent future importations; but does it affect the existing state of slavery? Were it right here to mention what passed in convention on the occasion, I might tell you that the southern states, even South Carolina herself, conceived this property to be secure by these words. I believe, whatever we may think here, that there was not a member of the Virginia delegation, who had the smallest suspicion of the abolition of slavery. Go to their meaning. Point out the clause where this formidable power of emancipation is inserted. But another clause of the constitution proves the absurdity of the supposition. The words of the clause are, ‘No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in con-

¹ Elliott's Debates, vol. ii. p. 432.

sequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.' Every one knows that slaves are held to service or labor; and when authority is given to owners of slaves to vindicate their property, can it be supposed they can be deprived of it? If a citizen of this state, in consequence of this clause, can take his runaway slave in Maryland, can it be seriously thought, that after taking him and bringing him home, he could be made free."¹

The sentiment of North Carolina, like that of Virginia, was strongly opposed to any continuance of the importation of slaves; but in both states, it was equally necessary to satisfy the minds of the people, that the property then existing in slaves was secured and protected.

When, in the convention of North Carolina, the last clause of the second section of the fourth article was read, Mr. Iredell explained the reason of the clause. "In some of the northern states," he observed, "they have emancipated all their slaves. If any of our slaves go there, and remain there a certain time, they would, by the present laws, be entitled to their freedom, so that their masters could not get them again. This would be extremely prejudicial to the inhabitants of the southern states, and to prevent it this clause is inserted in the constitution. Though the word slave be not mentioned, this is the meaning of it. The northern delegates, owing to their peculiar scruples on the subject of slavery, did not choose the word slave to be mentioned."²

On the other hand, the countenance given by the constitution to slavery, was urged at the north as a reason against ratifying it. Upon this subject, the following sensible remarks were made in the convention of Massachusetts, by

¹ Elliott's Debates, vol. ii, p. 437.

² Id. vol. ii. 157.

general Heath. "I apprehend," said he, "that it is not in our power to do anything for or against those who are in slavery in the southern states. No gentleman within these walls detests every idea of slavery more than I do. It is generally detested by the people of this commonwealth; and I ardently hope that the time will soon come, when our brethren in the southern states will view it as we do, and put a stop to it; but to this we have no right to compel them. Two questions naturally arise. If we ratify the constitution, shall we do anything by our act to hold the blacks in slavery; or shall we become the partakers of other men's sins? I think, neither of them. Each state is sovereign and independent, to a certain degree, and they have a right, and will regulate their own internal affairs as to themselves appears proper; and shall we refuse to eat or to drink, or to be united with those who do not think or act just as we do? Surely not. We are not, in this case, partakers of other men's sins; for in nothing do we voluntarily encourage the slavery of our fellow men."¹

Sentiments of this character finally prevailed; and such sentiments should now govern the conduct of the north.

The preceding extracts from the debates in the state conventions show, that, when in the commencement of the former number, we assumed that there were provisions in the federal constitution, on which the owners of slave property were induced to rely at the time of its adoption, we were fully warranted in that assumption.

They also show the entire correctness of the premises from which judge Nelson reasoned, in the opinion delivered by him, from which extracts were made in the latter part of the same number. The premises were, that the people of the slaveholding states were apprehensive that a non-slaveholding state might pass laws, whereby they would be pre-

¹ Elliott's Debates, vol. i, p. 124.

vented from regaining their slaves; and that the provision in the constitution was designed to secure them against any such state laws.

It is proposed now to conclude the review of judicial decisions, under the constitution and laws, as to fugitives from labor and fugitive criminals; and then to consider the duty of executive officers in regard to the latter.

Conclusion of the review of judicial decisions as to fugitives from labor.

After the decision of the supreme court of the state of New York, in the case of *Jack v. Martin*, the cause was removed in behalf of the slave into the court of errors, a court constituted of the president of the senate, chancellor of the state, judges of the supreme court, and all the senators. The hearing before the court of errors was in December, 1835.

Only two opinions were delivered at large. They were by the chancellor and senator Bishop.

The chancellor, after remarking that the decision of the court below was put upon the ground that congress not only had the power to legislate upon the subject, but that their legislation must necessarily be conclusive in relation to this matter, proceeded as follows :

“ I am one of those who have been in the habit of believing that the state legislatures had general powers to pass laws on all subjects, except those in which they were restricted by the constitution of the United States or their own local constitution, and that congress had no power to legislate on any subject, except so far as the power was delegated to it by the constitution of the United States. I have looked in vain among the powers delegated to congress by the constitution, for any general authority to that body to legislate on this subject. It certainly is not contained in any express grant of power, and it does not appear to be

embraced in the general grant of incidental powers, contained in the last clause of the constitution, relative to the powers of congress. Const. art. I, § 8, sub. 17. The law of the United States respecting fugitives from justice and fugitive slaves, is not a law to carry into effect any of the powers expressly granted to congress, 'or any other power vested by the constitution in the government of the United States or any department or officer thereof.' It appears to be a law to regulate the exercise of the rights secured to the individual states, or the inhabitants thereof, by the second section of the fourth article of the constitution; which section, like the ninth section of the fourth article, merely imposes a restriction and a duty upon other states and individuals in relation to such rights, but vests no power in the federal government, or any department or officer thereof, except the judicial power of declaring and enforcing the rights secured by the constitution. The act of February, 1793, conferring ministerial powers upon the state magistrates, and regulating the exercise of the powers of the state executive, is certainly not a law to carry into effect the judicial power of the United States, which judicial power cannot be vested in state officers. If the provisions of the constitution as to fugitive slaves and fugitives from justice, could not be carried into effect without the actual legislation of congress on the subject, perhaps a power of federal legislation might be implied from the constitution itself; but no such power can be inferred from the mere fact that it may be more convenient that congress should exercise the power, than that it should be exercised by the state legislatures. In these cases of fugitive slaves and fugitives from justice, it is not certain that any legislation whatever is necessary, or was contemplated by the constitution. The provision as to persons escaping from servitude in one state into another, appears by their journal to have been adopted by a unanimous vote of the convention. At that time the existence of

involuntary servitude, or the relation of master and servant, was known to and recognized by the laws of every state in the union except Massachusetts, and the legal right of recaption by the master existed in all, as a part of the customary or common law of the whole confederacy. On the other hand, the common law writ *de homine replegiando*, for the purpose of trying the right of the master to the services of the slave, was well known to the laws of the several states, and was in constant use for that purpose, except so far as it had been superseded by the more summary proceeding by *habeas corpus*, or by local legislation. The object of the framers of the constitution, therefore, was not to provide a new mode by which the master might be enabled to recover the services of his fugitive slave, but merely to restrain the exercise of a power, which the state legislatures, respectively, would otherwise have possessed, to deprive the master of such preëxisting right of recaption.

“If the person whose services are claimed is in fact a fugitive from servitude, under the laws of another state, the constitutional provision is imperative, that he shall be delivered up to his master upon claim made; and any state officer or private citizen, who owes allegiance to the United States, and has taken the usual oath to support the constitution thereof, cannot, without incurring the moral guilt of perjury, do any act to deprive the master of his right of recaption, where there is no real doubt that the person whose services are claimed, is in fact the slave of the claimant. However much, therefore, we may deplore the existence of slavery in any part of the union, as a national as well as a local evil, yet, as the right of the master to reclaim his fugitive slave is secured to him by the federal constitution, no good citizen, whose liberty and property is protected by that constitution, will interfere to prevent this provision from being carried into full effect, according to its spirit and effect; and even where the forms of law are resorted to for

the purpose of evading the constitutional provision, or to delay the remedy of the master in obtaining a return of his fugitive slave, it is undoubtedly the right, and may become the duty of the court, in which any proceedings for that purpose are instituted, to set them aside, if they are not commenced and carried on in good faith, and upon probable grounds for believing that the claim of the master to the service of the supposed slave is invalid."

The chancellor then examined the pleadings in the cause, by which the fact appeared to be admitted on the record, that the plaintiff owed service or labor to the defendant in another state, and had escaped from such servitude. Without reference to the validity of the act of congress or of any state legislation on the subject, he considered the fact thus admitted sufficient, under the constitution, to entitle the defendant to judgment for a return of the slave. And he therefore arrived at the conclusion that the judgment of the supreme court should be affirmed with costs; and that the damages which the defendant in error had sustained by the delay and vexation caused by the writ of error, should be awarded to her.

The course of reasoning of senator Bishop was similar to that used by judge Nelson in the supreme court.

Upon the question being put, shall this judgment be reversed? the members of the court unanimously voted in the negative. Whereupon the judgment of the supreme court was affirmed.¹

In a more recent case, a writ *de homine replegiando* having been sued out, a motion was made in August, 1837, by the claimant of the alleged slave, to quash the writ on the strength of the previous decision of the supreme court. The court, Nelson, C. J., presiding, directed the motion to be suspended until the next special term. In the meantime, the

¹ 14 Wend. 507-530.

attorney for the plaintiff had leave to prepare and serve his declaration, and the attorney for the defendant had leave to plead the proceedings had before the recorder under the act of congress; to which the plaintiff might demur, with a view to enter the formal judgment of the supreme court, so that the cause might be removed to the court of last resort in the state, for a final decision upon the constitutional question.¹

Thus the matter stands in New York, according to the latest reports of decisions of that state. We have but little to add to what judge Nelson has said upon the subject.

It is plain that, according to art. 4, § 2, clause 3, of the constitution, a person held as a slave in one state under the laws thereof, who escapes into another, is not to be discharged from slavery by means of any law or regulation existing in the state to which he escapes.

The owner's property being thus secured and protected by the constitution, he has the same right to take possession of his slave, when he finds him in the state to which he escapes, that he would have in the state from which he escaped. As, upon an escape from one county into another of the same state, the owner may take possession of his slave in the latter county without any warrant or process whatever, so, upon an escape from one state into another of this union, the owner may, in like manner, under the constitution which governs the union, take possession of his slave without any warrant or process.

If, in the state to which the slave escapes, there be any state law or state regulation to prevent the owner of the slave from taking possession of his slave and carrying him away, such state law or state regulation violates the provision in the constitution of the United States; and this constitution being the supreme law of the land, the state

¹ *Dixon v. Allender*, 18 Wend. 678.

law or state regulation which violates the same is null and void.

But there may be a question, whether the person who is seized, was in truth and in fact held to service in another state, under the laws thereof. Is this question to be tried by a jury in the state in which the seizure takes place? Certainly not. The counsel who argued the case of *Jack v. Martin* before the court of errors, on behalf of the owner, very correctly observed that "the constitution evidently contemplates a *summary investigation*. The fugitive is to be delivered up 'on claim.' These words import a summary proceeding." "If," said he, "it intended to declare that a fugitive servant should be delivered up after trial and judgment, attended with all the forms of the common law, the words 'on claim' would be idle. He could not be said to be delivered up on claim, whose surrender was the result of a final and conclusive judgment." The counsel said most truly that "the citizens of the slaveholding states would never have consented to subject themselves to the necessity of establishing their claims to their fugitive slaves, before juries composed of the inhabitants of non-slaveholding states. Indeed the difficulty of establishing the identity, by proof that would satisfy the strict common law rules of evidence on jury trials, and the great delay and expense of successive appeals, would render even the successful prosecution of a claim to service, in the state in which the arrest is made, in the ordinary mode by trial and judgment, vexatious and unprofitable to the claimant."

All that the claimant has to do, is to show, in a summary way, that the person whom he claims was his slave in another state.

Ought this enquiry to be gone into before any state tribunal, acting as such? It would seem not.

It was said by governor Randolph, in the Virginia convention, that "every government necessarily involves a

judiciary as a constituent part. If then a federal judiciary is necessary, what are the characters of its powers? That it shall be auxiliary to the federal government, support and maintain harmony between the United States and foreign powers and between different states, and prevent a failure of justice in cases to which particular state courts are incompetent. If this judiciary be reviewed as relative to these purposes, I think it will be found that nothing is granted which does not belong to a federal judiciary. Self defence is its first object. Has not the constitution said that the states shall not use such and such powers, and given exclusive powers to congress? If the state judiciaries could make decisions conformable to the laws of their states, in derogation to the general government, I humbly apprehend that the federal government would soon be encroached upon. If a particular state should be at liberty, through its judiciary, to prevent or impede the operation of the general government, the latter must soon be undermined. It is then necessary that its jurisdiction should extend to all cases, in law and equity, arising under this constitution and the laws of the United States.”¹

In the convention of North Carolina, Mr. Davis said, “it appears to me that the judiciary ought to be competent to the decision of any question arising out of the constitution itself. On a review of the principles of all free governments, it seems to me also necessary that the judicial power should be coëxtensive with the legislative. It is necessary in all governments, but particularly in a federal government, that its judiciary should be competent to the decision of all questions arising out of the constitution.” Again he said, “every member who has read the constitution with attention, must observe that there are certain fundamental principles in it, both of a positive and negative nature,

¹ Elliott's Debates, vol. 2. p. 418.

which, being intended for the general advantage of the community, ought not to be violated by any future legislation of the particular states. Every member will agree that the positive regulations ought to be carried into execution, and that the negative restrictions ought not to be disregarded or violated. Without a judiciary, the injunctions of the constitution may be disobeyed and the positive regulations neglected or contravened.”¹

If there be occasion for the exercise of judicial power, in any case arising under the provision of the constitution in regard to fugitives from labor, such judicial power should be exercised not by a state court, but, under art. 3, § 2, should be exercised by a court of the United States; and congress should, under art. 1, § 17, make all laws necessary and proper for carrying into execution the power vested in the judicial department.

4. *Decisions as to Fugitive Criminals.*

Under the constitution of the United States, a state within the union has no more right to afford an asylum to a person charged with a crime in another state than to those who have fled from service or labor. “The states,” says Mr. Rawle, “are considered as a common family whose harmony would be endangered, if they were to protect and detain such fugitives when demanded in one case by the executive authority of the state, or pursued in the other by the persons claiming an interest in their service.”²

The question whether theft is a felony of such a nature as to make it proper that the offender should be delivered up, has been discussed in the American courts, when the delivery was to be to a foreign state; and on that subject different opinions have been expressed; but the judges have

¹ Elliott's Debates, vol. 3. p. 141.

² Rawle on the Constitution, p. 99.

all agreed as to the propriety of delivering up felons charged with stealing property in a state within the confederacy.

In the case of *The People v. Schenck*, (2 Johns. R. 479,) the prisoner was indicted, in the city of New York, for felony in stealing a gun; and there was a special verdict which found that the prisoner did feloniously steal and carry away the gun in the state of New Jersey. The supreme court of New York held, that the prisoner was entitled to be discharged upon the indictment in that state, but ordered that he should be detained in prison for three weeks; and in the mean time, directed notice to be given to the executive of the state of New Jersey, that the prisoner was detained on a charge of felony committed there, stating that if no application should be made for the delivery of the prisoner within that time, he must be discharged.

In *Simmons's case*, (5 Binn. 617,) the prisoner was indicted in the city of Philadelphia, for feloniously stealing and carrying away some silver spoons and other articles; and the special verdict found that the fact was committed within the state of Delaware. The supreme court of Pennsylvania approved of what was done in New York in the case of *Schenck*, and the proceeding was similar.

In carrying into effect the provision in the federal constitution, we have, says chief justice Savage, nothing to do with the comity of nations, unless perhaps to infer from it that the framers of our constitution and laws, intended to provide a more perfect remedy; one which should reach every offence criminally cognizable by the laws of any of the states; the language being "treason, felony, or other crime."¹

It was contended before the supreme court of New York, in *Clark's case*, that a crime of greater atrocity was intended by the constitution than was charged in that case; and

¹ *Clark's case*, 9 Wend. 222.

indeed the ground was taken that no crime at all had been committed, for it was insisted that the statute of Rhode Island, which was alleged to have been violated, contemplated proceedings merely of a civil nature. Chief justice Savage, who delivered the opinion of the court, answered the objection as follows: "The first answer is that the statute of Rhode Island is not properly before us. An offence of a highly immoral character is stated in the warrant, and is certified by the governor of Rhode Island to have been made criminal by the laws of that state. This is evidence enough, in this stage of the proceedings, of the nature of the offence; but if we look into the statute of Rhode Island, which has been informally read from their statute book, we find a criminal offence. It is this: 'that if any officer of a bank shall so fraudulently manage its concerns that the public, or any individual dealing with it, shall be defrauded in the payment of their just demands, such officer shall be prosecuted in the supreme judicial court by indictment, and on conviction the offender may be fined \$5000.' This is very plain language. There is to be a prosecution by indictment, and a fine is imposed, which goes of course to the public, not to the party defrauded. There is nothing here like a civil remedy."¹

"Had our constitution and laws," says chief justice Savage, "been silent on this subject, and no conventional arrangement existed between the several states composing our confederacy, it may be conceded that the practice arising from the comity of nations would be applicable; and before we would surrender in one state any person demanded by another, as a fugitive from justice, it would be our duty to examine into the evidence of the alleged crime, and be satisfied that no reasonable doubt existed as to his guilt. But under our federal government, this matter has been regu-

¹ 9 Wend. 221.

lated, and we are not left to the uncertainty arising from an inquiry in one state into the particulars of an offence committed in another. The constitution of the United States provides that 'a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.' Here then is the law on the subject—a positive regulation and tantamount to a treaty stipulation; and we are not to resort to the comity of nations for our guidance. Every person who is charged with a crime in any state and shall flee in another, shall be delivered up. It is not necessary to be shown that such person is guilty. It is not necessary, as under the comity of nations, to examine into the facts alleged against him constituting the crime. It is sufficient that he is charged with having committed a crime."¹

But how charged? The law of congress has answered this question. In order, says the chief justice of New York, to give the governor of this state jurisdiction in such a case, three things are requisite; 1, The fugitive must be demanded by the executive of the state from which he fled; 2, A copy of an indictment found, or an affidavit made before a magistrate, charging the fugitive with having committed the crime; 3, such copy of the indictment or affidavit must be certified as authentic by the executive. If these prerequisites have been complied with, then the warrant of the governor properly issues, and the prisoner is legally restrained of his liberty.²

In Clark's case, a *habeas corpus* was awarded, directed to the persons having him in custody, commanding them to bring him before the chief justice, and to exhibit the cause of his detention. The return upon the writ of *habeas corpus*

¹ 9 Wend. 218, 219,

² Id. 219.

showed that he was detained in custody by virtue of a warrant issued by the governor of the state of New York, in the following words :

“ Enos T. Throop, governor of the state of New York, to the sheriff of the city and county of New York, and the sheriffs, constables and other peace officers of the several counties in the said state : Whereas it has been represented to me by the governor of the state of Rhode Island, that John L. Clark, late of Providence, in the said state, has been guilty of frauds in abstracting from the Burrilville bank, in that state, money, notes, and bank bills, while president of said bank, in a fraudulent manner, which said acts are made criminal by the laws of that state ; and that he has fled from justice in that state and has taken refuge in the state of New York ; and said governor of Rhode Island has, in pursuance of the constitution and laws of the United States, demanded of me that I should cause the said John L. Clark to be arrested and delivered into the custody of Henry G. Munford, sheriff of the county of Providence, who is duly authorized to receive him into his custody and convey him back to the said state of Rhode Island : And whereas the said representation and demand is accompanied by an affidavit, taken before a justice of the peace of the said state of Rhode Island, whereby the said John L. Clark is charged with the said crime ; which affidavit is certified by the said governor of Rhode Island to be duly authenticated : You are therefore required to arrest the said John L. Clark, wherever he may be found within the state, and to deliver him into the custody of the said Henry G. Munford, to be taken back to the said state from whence he fled, pursuant to the said representation. Given under my hand and the privy seal of the state, at the city of Albany, this fifth day of May, in the year of our Lord, one thousand eight hundred and thirty two.”

The opinion of the court as to the validity of the cause

of detention appearing by this return, was delivered by chief justice Savage as follows: "It is," said he, "there expressly recited, 1, that the governor of Rhode Island has demanded that John L. Clark be arrested and delivered up as a fugitive from justice; 2, that a copy of an affidavit was presented, charging Clark with certain acts, which the governor of Rhode Island certifies are made criminal by the laws of that state; 3, that the affidavit is certified by the governor of Rhode Island to be duly authenticated. Here then is a literal compliance with the constitution and laws of the United States; and the governor of New York had full power and authority to issue his warrant to direct Clark to be arrested and delivered over to the agent of the state of Rhode Island."

Clark made an affidavit to the following effect: "that according to the information and belief of this deponent, and as he is advised by counsel and believes to be true, this deponent has not committed any act or thing recited in said warrant; and that he is not guilty of any act or thing which is a crime or made criminal under and by the laws of the state of Rhode Island, and which is made the pretence for said warrant and the arrest of this deponent; and this deponent wholly denies the guilt as recited in said warrant. This deponent expressly denies that he has fraudulently abstracted from the Burrilville bank of Rhode Island money, notes and bank bills, while president of said bank, or at any time or in any manner which is made criminal by the laws of that state. On the contrary thereof, this deponent says that he has not at any time abstracted or taken from said bank, money, notes and bank bills, other than what has been paid to him by the cashier or other officer of that bank, and upon vouchers or discounted paper entered in course of business upon the books of the bank, and sanctioned by the direction or some part thereof, or committees, or persons duly authorized in the premises."

Chief justice Savage delivered the opinion of the court as to the effect of this affidavit as follows: "The prisoner has made an affidavit denying all criminality or fraud in relation to the Burrilville bank, which are charged against him in the affidavit presented to the governor of this state. But whether he is guilty or not is not the question to be decided here. It is whether he has been properly charged with guilt, according to the constitution and the act of congress. The prisoner does not deny any fact set forth in the warrant upon which he has been arrested. It is not denied that the governor of Rhode Island has demanded him as a fugitive from justice. It is not denied that an affidavit charging him with criminality was presented to the governor of New York; nor is it denied that the governor of Rhode Island has certified that that affidavit is properly authenticated. These are the material facts. Governor Throop does not assert the prisoner's guilt, but that he had before him such evidence as the law directed to authorize the issuing his warrant. Whether the prisoner is guilty or innocent is not the question before us; nor is any judicial tribunal in this state charged with that inquiry. By the constitution, full faith and credit are to be given in all the states to the judicial proceedings of each state. When such proceedings have been had in one state as ought to put any individual within it upon his trial, and those proceedings are duly authenticated, full faith and credit shall be given to them in every other state. If such person flee to another state, it is not necessary to repeat in such state to which he has fled, the initiatory proceedings which have already been held, but he is to be sent back to be tried where the offence is charged to have been committed—to have the proceedings consummated where they were begun."

5. Duty of executive officers in relation to fugitive criminals.

All executive officers of the states are bound by oath or affirmation to support the constitution of the United States. Art. 6, § 2.

This constitution; and the laws of the United States made in pursuance thereof, are the supreme law of the land, and the judges in every state are bound thereby; any thing in the constitution or laws of any state to the contrary notwithstanding. Art. 6, § 2.

The supreme law of the land has been so expounded by the judges of the supreme court of the state of New York as to give to it full effect. A very different exposition has been made by the executive of that state.

We premise that, by the laws of Virginia, any person who shall steal a slave is guilty of felony, and upon conviction thereof is to undergo a confinement in the penitentiary for a period not less than three nor more than eight years. 1 R. C. 1819, p. 427, 8, § 29.

The executive authority of Virginia, in July last, demanded three persons, to wit: Peter Johnson, Edward Smith and Isaac Gansay, as fugitives from justice, of the executive authority of New York. There was produced to the executive of New York an affidavit made before a magistrate of Virginia by one John G. Colley, of Norfolk borough. The affidavit was dated the 22d of July, 1839, and charged "that on or about the 15th instant, Peter Johnson, Edward Smith and Isaac Gansay, now attached to the schooner Robert Center, at present in New York, did feloniously steal and take from the said Colley a certain negro man slave named Isaac, the property of said Colley." And this affidavit was certified as authentic by the executive of Virginia. It thereupon became the duty of the executive of New York, according to the constitution and laws of the United States, and according also to the deci-

sions of the supreme court of the state of New York, to cause the persons so demanded to be arrested and delivered to the proper agent of the executive of Virginia.

This the governor of New York has declined doing. In a communication of the 16th of September, 1839, to the executive of Virginia, he takes the following ground :

“ I beg leave to state most respectfully, that admitting the affidavit to be sufficient, in form and substance, to charge the defendants with the crime of stealing a negro slave from his master in the state of Virginia, as defined by the laws of that state, yet, in my opinion, the offence is not within the meaning of the constitution of the United States. The words employed in the constitution, ‘ treason, felony or other crime,’ are indeed very comprehensive. It has long been considered that citizens of the state upon which the requisition is made are liable to be surrendered, as well as citizens of the state making the demand ; and it is further regarded as settled that the discretion of the executive in making the demand is unlimited, while the executive upon whom it is made has no legal right to refuse compliance, if the offence charged is an act of ‘ treason, felony, or other crime,’ within the meaning of the constitution. Can any state at its pleasure declare an act to be treason, felony, or other crime, and thus bring it within the constitutional provision ? I confess that such does not seem to me the proper construction of the constitution. After due consideration, I am of opinion that the provision applies only to those acts, which, if committed within the jurisdiction of the state in which the person accused is found, would be treasonable, felonious, or criminal by the laws of that state.”

The correspondence which we are now considering furnishes evidence that the governor of the state of New York is an able man ; and we do not consider it any reproach to him, that he is not perfectly familiar with the decisions of

the supreme court of his own state upon questions of constitutional law. But it is cause of regret that he did not, before affirming so important a proposition as that contained in the last sentence above quoted, consult with his attorney general. Had he done so, he must have learnt from him that the supreme court of New York had pronounced a different decision in Clark's case.

The governor of New York proceeds as follows: "I do not question the constitutional right of a state to make such a penal code as it shall deem necessary or expedient, nor do I claim that citizens of another state shall be exempted from arrest, trial and punishment in the state adopting such code, however different its enactments may be from those existing in their own state. The true question is, whether the state of which they are citizens is under a constitutional obligation to surrender its citizens, to be carried to the offended state, and there tried for offences unknown to the laws of their own state. I believe the right to demand, and the reciprocal obligation to surrender fugitives from justice, between sovereign and independent nations, as defined by the laws of nations, includes only those cases in which the acts constituting the offence charged are recognized by the universal law of all civilized countries."

Chancellor Kent has expressed the opinion that those crimes "which strike deeply at the rights of property, and are inconsistent with the safety and harmony of commercial intercourse, come within the mischief to be prevented and within the necessity as well as the equity of the remedy. If larceny may be committed and the fugitive protected, why not compound larceny, as burglary and robbery, and why not forgery and arson? They are all equally invasions of the rights of property." This language is used by the chancellor when discussing the propriety of delivering up one charged with having committed a theft

in a foreign state.¹ And all can see that it applies with increased force to a crime which strikes deeply at the rights of property in the south, is inconsistent with the harmony of intercourse between citizens of the northern and southern states, and tends to impair the permanence of the union and the safety of the general government. Such a crime comes within the mischief which the constitution of the United States designed to prevent, and the remedy should be extended to it when the terms that are employed are abundantly sufficient to embrace it.

The governor of New York, after stating that the obligation to surrender, under the law of nations, includes only those cases in which the acts constituting the offence charged are recognized by the universal law of all civilized countries, proceeds as follows :

“I think it is also well understood that the object of the constitutional provision in question was to recognize and establish this principle in the mutual relations of the states as independent, equal and sovereign communities. As they could form no treaties between themselves, it was necessarily engrafted in the constitution. I cannot doubt that this construction is just. Civil liberty would be very imperfectly secured in any country whose government was bound to surrender its citizens to be tried and condemned in a foreign jurisdiction for acts not prohibited by its own laws. The principle, if adopted, would virtually extend the legislation of a state beyond its own territory and over the citizens of another state, and acts which the policy and habits of one state may lead its legislature to punish as felony must be considered of that heinous character in another state for certain purposes, while for all other purposes they would be regarded only as violations of moral law. In some of the states of the union, adultery is made a felony ;

¹ Washburn's case, 4 Johns. ch. rep. 113.

in another, the being the father of an illegitimate child is made a crime; and in another, marriage without license or other formalities is penal. To admit the principle that violation of these and similar laws, which are in their character mere municipal regulations, adapted to the policy of a particular community, are 'felonies' and 'crimes,' within the meaning of the constitution, would involve the most serious consequences by imposing obligations which it would be impossible to execute. It is evident there must be some limit to the description of crimes meant by the constitution; and that which I have applied in this instance, seems to me to give full and fair scope to the provision, and at the same time preserve the right of exclusive legislation to each state over persons confessedly within its jurisdiction, while it preserves that harmony which is so essential to our mutual interest."

It must in candor be acknowledged that there is a good deal of force in some of these observations; and that there is difficulty in holding the term crime, in the constitution, as synonymous with offence. But there is no difficulty at all in establishing that when the governor of New York takes the ground that he will not deliver up a person charged in another state with a crime, unless the fact charged be recognized as an offence by the laws of all civilized countries, and would, if committed in New York, be an offence according to the laws of that state, he takes ground which is wholly untenable, according to the decision of the supreme court of his own state in Clark's case, and sets up a new principle entirely different from that which was acted on by his predecessor, governor Throop.

By the laws of Virginia, if any officer of public trust in the commonwealth, or any officer or director of any bank chartered by the commonwealth, shall embezzle or fraudulently convert to his use any sum of money, bank note, bill, check, bond or other security or facility placed under

his care or management, by virtue of his office or place, the person so offending is guilty of felony, and, upon conviction thereof, is to be sentenced to imprisonment in the public jail and penitentiary house, for a term not less than three nor more than ten years. Sess. acts, 1819, 20, p. 19, ch. 22, § 2. Though the act thus made felony by the laws of Virginia was by the common law of England only a breach of trust and not punishable criminally, a person charged in Virginia with this offence, who should flee from justice and be found in another state, would, according to governor Throop and the supreme court of New York, be delivered up "to the state having jurisdiction of the crime." But according to governor Seward, the fact charged not being recognized as a crime by the universal law of all civilized countries, there would be no surrender. We have no hesitation in declaring that it seems to us it would be a violation of the federal constitution not to make the surrender in such a case.

"However the point may be," says Mr. Justice Story, "as to foreign nations, it cannot be questioned that it is of vital importance to the public administration of criminal justice and the security of the respective states, that criminals who have committed crimes therein should not find an asylum in other states, but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crimes and cutting off the chances of escape from punishment. It will promote harmony and good feeling among the states; and it will increase the general sense of the blessings of the national government. It will moreover give strength to a great moral duty which neighboring states especially owe to each other, by elevating the policy of the mutual suppression of crimes into a legal obligation. Hitherto it has proved as useful in practice as it is unexceptionable in its character."¹

¹ Story on the Constitution, vol. iii, p. 676.

Governor Seward thus proceeds: "The offence charged in the affidavit before me is not understood to be that of kidnapping a person, by which he was deprived of his liberty, or held in duress, or suffered personal wrong or injustice, but it is understood to mean the taking of a slave, considered as property, from the owner. If I am incorrect in this supposition, the vagueness and uncertainty of the affidavit must excuse my error. But I think there can be no controversy on this point. I need not inform you, sir, that there is no law of this state which recognizes slavery, no statute which admits that one man can be the property of another, or that one man can be stolen from another. On the other hand, our constitution and laws abolish slavery in every form. The act charged in the affidavit, if it had been committed in this state, would not contravene any statute; nor is it necessary to inform you that the common law which is in force in this state, when not abrogated by statute, does not recognize slavery nor make the act of which the parties are accused in this case felonious or criminal."

The decisions of the supreme court of New York, cited in our former number, show, that until a very recent period the laws of that state recognized slavery, and her statutes admitted that one man might be the property of another. Such property was the subject of sale and the owner's rights were protected by the laws.

It may however be conceded that the act charged in the affidavit, if it had been committed in New York, would not have contravened any existing statute of that state making such an act felonious or criminal. It might further be conceded that the act of stealing a slave could not be deemed a common law felony. And still the conclusion, that the act charged in the affidavit is not a felony or crime, within the meaning of the federal constitution, is one which cannot be sustained, if the precedent of governor Throop be cor-

rect, and the opinion of the supreme court of New York be a sound exposition of the constitutional obligation to surrender.

Nay more, it is not necessary to call in aid that precedent and that opinion to the whole extent that they authorize. The conclusion that the fact charged in the affidavit is not a felony or crime within the meaning of the federal constitution is untenable upon another ground. In a communication of the 4th of October, 1839, from the lieutenant governor of Virginia to the governor of New York, this language is used, "Is it true that the offence committed by Peter Johnson, Edward Smith, and Isaac Gansay is not recognized as criminal by 'the universal law of all civilized countries?' They are charged with feloniously stealing from John G. Colley, a citizen of this state, property which could not have been worth less than six or seven hundred dollars. And I understand stealing to be recognized as a crime by all laws, human and divine." In governor Seward's reply of the 24th of October, 1839, he says, "it is freely admitted that the argument would be at an end if it were as clear that one human being may be the property of another as it is that stealing is a crime." It might not be going too far to say that stealing property is recognized as a crime by all laws, and that any state may make *that* property which she pleases. But here the question is not between Virginia, whose laws recognize slaves as property, and a foreign state, whose laws recognize no such property. The question is very different. It is between Virginia, under whose laws slaves are property, and New York, who has made a compact with Virginia recognizing this very kind of property. New York has said to Virginia that if she will come into the union with her, a constitution shall be adopted for the government of the states, by which New York will agree that, no matter what laws or regulations New York may herself adopt to abolish slavery within her

borders, persons held as slaves in Virginia, under her laws, who may escape into New York, shall not be discharged from slavery, but the right of property of the owners shall be respected in New York, and the slaves shall be delivered up on claim of the owners. New York has further agreed by the same constitution, that a person charged in Virginia with a crime, who shall flee from justice and be found in New York, shall be delivered up to be removed to Virginia. After a union of the states has been formed, based upon the provisions contained in this constitution, a person charged in Virginia with stealing property, flees from justice and is found in New York; Virginia demands the fugitive and New York refuses to deliver him up. New York, while so refusing, admits that if the person is charged with a crime he ought to be delivered up: and she admits that stealing property is a crime. But the ground of her refusal is, that nothing was stolen except a person held as a slave, and that a person held as a slave, is not property by the laws of New York.

We trust that it is not yet come to this, that New York shall be told in vain that she herself has said, persons held in Virginia as slaves shall be recognized as property. We trust it is not too late to remind her that she has so said in a constitution which she agreed should be her supreme law, and which she declared the members of her state legislature and all her executive and judicial officers should be solemnly pledged to support.

C. R.

ART. V.—BIOGRAPHICAL SKETCH OF JOHN WINSLOW.

THE name of general Winslow fills so considerable a space in the history of Massachusetts, that he seems to deserve a place among the judges of her courts, although little is known of him in that connection.

He was the presiding justice of the court of common pleas in his native county of Plymouth, for the term of twelve years, and held that office at the time of his death.

He was of the family of governor Winslow, and was born in Marshfield in 1703. His father, Isaac Winslow, who was a son of the governor, had been chief justice of the same court, for the term of ten years, and left the bench in 1738.

General Winslow was educated as a merchant, and pursued mercantile business as a means of livelihood.

Early in life, however, he became connected with public affairs, and among other offices, he was for some time register of probate for the county of Plymouth.

Soon after this appointment he was commissioned as a military officer, and entered upon a brilliant and successful career. An expedition was fitted out under the direction of the crown, against Cuba, then, as now, under the government of Spain, and the command of a company was on that occasion given to Mr. Winslow. He took an active part in the enterprise, but it altogether failed. The troops belonging to the British army were attacked and swept off by disease to such a degree, that of the five hundred men who had been furnished by Massachusetts, fifty only returned from this disastrous campaign.

In 1744, he was in command of a company which formed a part of an expedition then fitted out against the French in Nova Scotia, and ten years afterwards he led an expedition against the Indians in the Castine part of Maine.

In these various enterprises, his courage and conduct had been such as to secure him general confidence, and when in the year 1755 it was desirable to raise a new army to carry on the war with the French, general Winslow, who held the rank of lieutenant colonel in the expedition, was able to enlist two thousand men in the space of two months.

The enterprise in which he now bore a part, was among

the most memorable in the annals of New England, not so much on account of the magnitude of its consequences, as the incidents that marked its progress.

The whole expedition was put under the general command of colonel Monckton, but the chief responsibility rested upon lieutenant colonel Winslow, who was at the head of the provincial troops.

The destination of this army was Nova Scotia, which was claimed by Great Britain under the treaty of Utrecht.

The inhabitants of a considerable portion of the country were French, who had been suffered to retain their property and religion, under an understanding that they would in the case of a war with France remain neutral. They were accordingly known as the "French Neutrals," and the early history of Massachusetts contains frequent references to them as a people.

From a real or supposed violation of their neutrality, and the danger which was apprehended from their number and concert of action, it was thought to be necessary to remove them from the country and to scatter them through the English colonies.

The execution of this severe, not to say odious measure, devolved upon general Winslow, whose good judgment, forbearance and lenity in performing so ungracious a duty, met with universal approbation.

There was in the character and manners of this people more of romance than ordinarily is found in civilized life. They realized the poet's dream of Arcadian simplicity, honesty, happiness and contentment. Attached to their religion, fond beyond measure of their homes, possessed of comfortable if not independent estates in their well cultivated and well stocked farms, they formed a most interesting community.

As nothing but stratagem could avail in inducing them to bring themselves within the power of the invading army,

that was resorted to, and about five hundred men in the district of Minas were thus seized. The families of these were also secured, making a total of nearly two thousand persons in that district alone. To prevent any escape the country was laid waste by fire. There were more than two hundred and fifty houses burned in a single district.

The historian of Nova Scotia,¹ describing this scene, says, the soldiery "stationed in the midst of a beautiful and fertile country, suddenly found themselves without a foe to subdue and without population to protect.

"The volumes of smoke which the half expiring embers emitted, while they marked the site of the peasants' humble cottage, bore testimony to the extent of destruction.

"For several successive evenings the cattle assembled around the smouldering ruins, as if in anxious expectation of their masters, while all night long the faithful watchdogs of the Neutrals howled over the scene of desolation, and mourned alike the hand that fed and the house that sheltered them."

The whole population were forced on board ships and carried off into exile. More than a thousand were distributed through Massachusetts, being divided among the towns and supported for a while at the public charge. But they were never reconciled to their state of bondage and dependence, and never mingled with the inhabitants or became incorporated with them. Many of them died, and some returned at last to their former homes, and their history is lost.

General Winslow having executed this unpleasant commission, returned to Massachusetts in disgust at the treatment to which the Provincial troops were subjected by the officers of the regular army.

He did not however long remain inactive. War was then raging all along the frontier settlements. The year

¹ Halliburton.

'55 became memorable not only by the defeat of general Braddock, but by disasters upon the northern frontier. The following year, general Winslow was in command of an expedition under lord Loudon against Crown Point, but accomplished little by the enterprise. He however received on this occasion a commission as commander in chief of the Provincial troops, from the governor of New York.

The next year, 1757, he received from Governor Pownall, the appointment of major general of the Massachusetts forces, and this commission was renewed by governor Bernard in 1762.

Nor was it in military life only that he received marks of public confidence. He filled many important civil posts of honor, especially that of counsellor, which was ever regarded as one of the most honorable in the province under its charter form of government.

It may have seemed almost a solecism that the name of general Winslow should have been selected as deserving notice as one of the judges of the commonwealth. But in addition to his eminent character as a public officer, there seemed to be a propriety in illustrating through him the qualifications which were regarded as fitting a man, at that period of our history, for a judicial station.

At the age of fifty nine, without any previous preparation or study, he was made the chief justice of his county.

How he succeeded in his new sphere of duties—or how the stern soldier and exemplary officer was able to hold the scales of justice between his fellow citizens, does not appear. He retained the office till his death, May 17, 1774, at the age of 71.

His contemporaries spoke of his character in the obituary notices of him, which have been preserved, in terms of high eulogy, and the long time during which he retained the public confidence seems to have justified such commendations, for he was alike esteemed as a gentleman, a soldier, and a magistrate.

E. W.

ART. VI.—ON MISTAKES OF LAW.

[Concluded from the last number.]

HAVING, in our last number, inquired somewhat into the grounds of the alleged doctrine, that there can be no relief against mistakes of law, we proceed now to an examination of the authorities, with a view to ascertain whether from them it can be satisfactorily made out, that such a doctrine does actually exist.

The first case we shall notice, is that of *Bilbie v. Lumley*,¹ a leading case on the subject. There an action was brought by an underwriter on a policy of insurance, to recover back money paid on a loss by capture. The position assumed by the plaintiff was, that the money was paid under a mistake. It does not, however, appear from the report, what evidence there was to establish that fact. It may be admitted, that the underwriter was not legally obligated to pay the loss;—a material letter, then in the possession of the assured, not having been disclosed at the time the policy was effected. But the casualty contemplated by the parties had occurred; a loss had happened. That the letter in question was fraudulently withheld, was not pretended; and such a supposition is rendered highly improbable by the fact, that the same letter was submitted, with the other papers, to the inspection of the underwriters, before the loss was adjusted. Under these circumstances, it is possible, to say the least, that the plaintiff might have thought himself bound in honor and honesty to pay, though he knew that, by the strict letter of the law, he was exonerated; and that he might afterwards, for some cause, have changed his views of the matter. At all events, as the defendant had been guilty of no moral delinquency, as a loss

¹ 2 East, 469.

had actually occurred, and must be borne by one party or the other, and as the plaintiff had paid the money, it can scarcely be said to have been against conscience for the defendant to retain it.

At the trial before Mr. justice Rooke, the plaintiff had a verdict. On a motion for a new trial, the case was not argued. Lord Ellenborough asked the counsel for the plaintiff, whether there was any case in which a party who had paid money with a full knowledge of the facts of the case, could recover it back on account of his ignorance of the law. The question might have been answered in the affirmative by reference to at least two cases,¹ as we shall hereafter show. But what if no such case could be produced? Because a thing has never been done, does it follow, necessarily, that it should never be done? His lordship proceeded to say, "the case of *Chatfield v. Paxton* was the only one he ever heard of, where lord Kenyon, at *nisi prius*, intimated something of that sort." Verily, if the decision in this case were to be taken as a fair specimen of judicial candor, one might well say, with Jeremy Bentham, "the judge is the advocate run to seed." *Chatfield v. Paxton* was an action to recover back money paid under a mistake, and the plaintiff prevailed. At the trial, lord Kenyon is reported to have said, "it is not only necessary that the plaintiff should know all the facts, but that he should know the legal consequences of them."² And Sir Vicary Gibbs,³ who was of counsel for the defendant in the case, represents lord Kenyon to have ruled, that "a payment made under an ignorance of the law would enable the plaintiff to recover back the money;" and the ground on which he moved for a new trial, which, under all the circumstances of the case, was denied, was the misdirection

¹ *Ancher v. The Bank of England*, 2 Dougl. 637. *Bize v. Dickason*, 1 J. K. 285.

² *Chitty on Bills*, 538, (8th Ed.)

³ See in *Brisbane v. Dacres*, 5 Taunt. 143.

of the judge on this point. A very intelligible *intimation* this of lord Kenyon's, be it worth what it may.

As lord Ellenborough lays so much stress on the absence of what he deems sufficient authority for the recovery of money paid under ignorance of the law, we might reasonably expect he would adduce some weighty authorities against such recovery. The only case he cites to that point, is *Lowry v. Bourdieu*,¹ in which, he says, "money paid under a mere mistake of the law was endeavored to be recovered back." One would naturally infer, from this language, that the case in question was decided on the ground of mistake of law; in which inference if he were to repose, he would labor under a grievous error of fact. The action there was brought to recover back the premium paid on a policy of insurance, on ship and cargo, in which the insured had no interest. Lord Mansfield said it was a gaming policy, and against an act of parliament, and therefore it was clear, that the court would not interfere to assist either party, according to the well known rule, *in pari delicto melior est conditio possidentis*. Two of the other judges were also of opinion that it was a gaming policy. But Mr. justice Willes thought otherwise on this point. The parties, he supposed, believed there was an interest, and he said it would be very hard that a man should lose what he had paid under a mere mistake. He thought, therefore, that in conscience the defendant ought to refund the money. The case, then, it would seem, turned on the point, that the transaction was illegal and the parties equally guilty. Mr justice Buller, it is true, remarked that there was no mistake in matter of fact, and if the law was mistaken, the rule applied, *ignorantia juris non excusat*. And this is all he said about mistake; but he proceeded to state, that this was a gaming policy, and without interest, and he dwelt particularly upon the circumstance of the

¹ 2 Dougl. 468.

contract's being executed. Lord Mansfield and Mr. justice Ashhurst said not one word about mistake of any kind.

It is worth remarking, that the counsel for the defendant, three eminent lawyers, the Attorney General, Cowper, and Dunning, virtually admitted that if the money had been paid under a mistake of the law, it might have been reclaimed; for they said, *inter alia*, "as the plaintiffs paid the money with their eyes open, and not under any mistake of the law," the court would not assist them to recover it back. And Bearcroft, on the other side, said, it happened every day, that the premium was recovered back when it had been paid upon a mistake in point of law. All this goes to show what seems to have been the general understanding of the bar on the subject.

It is with the maxim, *ignorantia juris non excusat*, sanctioned by the authority of Mr. justice Buller in this case, that lord Ellenborough closes his opinion in *Bilbie v. Lumley*. We have already stated our reasons for believing this maxim to have, properly, no application to either of these cases, or to any similar case.¹ To the reasoning employed by lord Ellenborough in *Bilbie v. Lumley*, we have also alluded.² We have gone somewhat at large into the grounds on which this decision professes to proceed, because the case is very often cited, and is, in fact, one of the main pillars on which the subsequent decisions and *dicta* on the subject rest.

In *Brisbane v. Dacres*,³ also a prominent case, some of the judges relied much on *Bilbie v. Lumley*, which chief justice Mansfield then very happily characterized, as "a most positive decision." In this case, the plaintiff, while captain of a vessel belonging to the squadron of admiral Dacres, had received on board his vessel a quantity of public specie, and also a large amount of private treasure, to be transported to England. Of the money received for

¹ Ante, 157.

² Ante, 150.

³ 5 Taunt. 143.

performing this service, he had paid over to admiral Dacres a large sum, in part of one third of the freight, which, in such cases, captains had been used to pay to the commander of the squadron; and he now sought to recover back this money, on the ground that the admiral was entitled to no part of such freight. The court were unanimously of opinion, that he could not recover back the money paid on account of the private specie. Mr. justice Gibbs held, that it was illegal for captain Brisbane to carry such specie;—an opinion which he had occasion, soon afterwards, to overrule.¹ Mr. justice Chambre thought it immaterial, for the purposes of that case, whether the transaction was illegal or not. The point, however, chiefly considered by all the judges, respected the money, a very small sum, paid towards the third part of freight of the public treasure, and on this they decided against the plaintiff's right to recover, the court being three to one against Mr. justice Chambre, who, so far as the question of mistake of law was concerned, is thought by some to have had the better of the argument on this point, as he certainly had on the other. Indeed, the three judges, whose opinion was against the right of recovery, did, by no means, rest solely on the consideration of mistake of law. Mr. justice Gibbs, who alone can, with any propriety, be said to have put the case on that ground, had "considerable difficulty in saying, that there was anything unconscientious in admiral Dacres requiring this money to be paid to him, or receiving it when it was paid." Chief justice Mansfield said, the maxim, *volenti non fit injuria*, applied most strongly to the case, and so far from regarding it as unconscientious for the defendant to retain the money, he thought "it would be most contrary to *aequum et bonum*, if the defendant were obliged to repay it." And Mr. justice Heath thought it "very difficult to say that there was any evidence of ignorance of the law."

¹ Hatchwell v. Cooke, 6 Taunt. 577.

In *Stevens v. Lynch*,¹ the defendant, the drawer of a bill, with a knowledge that time had been given to the acceptor, had told the holder, "I know I am liable, and if the acceptor does not pay it I will;" and on this promise the plaintiff was held entitled to recover. We were never able to perceive how, on principle, a promise made by the drawer of a bill, or the endorser of a bill or note, after he had been discharged by laches, could be held legally binding. The undertaking of such a party is altogether conditional, and if the terms of the condition have not been complied with, he is legally, and, in many cases, morally, under no more obligation to pay than any one else. If, with his eyes open, he choose to pay, it may be very well. The difficulty is, to perceive how, in such a case, a promise to pay can be enforced by law. Before the promise, the party was absolutely discharged. His agreement had completely done its office. What consideration, therefore, has the promise to rest upon? The case is different where a new promise is set up in answer to a plea of the statute of limitation, or of infancy. There, the debt was, all the while, an actual, subsisting debt. The promise is not the foundation of the action, but simply the waiver of a special ground of defence, of which the party might otherwise have availed himself. Accordingly, we think that, so far as the doctrine goes, there is good reason in what the courts of Massachusetts have held to be well settled, namely, that a promise made under such circumstances as show an ignorance that the party is legally discharged, is without consideration, and void.² The same doctrine is held in Kentucky.³

¹ 12 East, 34.

² *Freeman v. Boynton*, 7 Mass. 483.; and see *May v. Coffin*, 4 Mass. 347. *Warder v. Tucker*, 7 Mass. 449. *Garland v. Salem Bank*, 9 Mass. 408.

³ *Lawrence v. Ralston*, 3 Bibb, 103. *Ralston v. Bullitts*, 3 Bibb, 261. *Underwood v. Brockman*, 4 Dana, 309.

*Gomery v. Bond*¹ was a case where the seller of goods, on the buyer's refusing to accept them, requested the latter to sell them for him, which he agreed to do if he could, but finally returned them to the seller, who declined receiving them back, and brought this action for the price. The case was tried before Mr. baron Richards, who directed the jury, in deciding whether the plaintiff had waived the contract, to consider whether, at the time he made the request to sell, he was aware of his rights. The plaintiff had a verdict, and the defendant moved for a new trial, on the ground of misdirection of the judge on this point. The court said nothing, directly, about ignorance or mistake of rights, but they deemed the point in question to have been improperly left to the jury, and granted a new trial. Lord Ellenborough thought there could be no doubt, from the evidence, that the plaintiff had waived the contract, and allowed the other party to sell the goods for him.

The case of the *East India Company v. Tritton*,² was an action to recover back money paid by the plaintiffs as acceptors of certain bills of exchange, to the defendants, on the faith of an insufficient prior endorsement, of the validity of which the plaintiffs had, and the defendants had not, the means of judging. The defendants received the money merely as agents of a prior party, and had paid it over in the usual course of business. The case, therefore, would seem to be disposed of by the familiar principle, that where an agent has received money, *bona fide*, and paid it over to his principal, fairly, and without notice not to do so, that is a sufficient protection to the agent.³ The court put their decision very much on this ground; but Mr. justice Holroyd said the money was paid not under a mistake of fact but of law, and, therefore, the case of *Bilbie v. Lumley*

¹ 3 Maule & Selw. 378.

² 3 Barn. & Cresw. 280.

³ See Story on Agency, 304.

was sufficient to dispose of the question. The inquiry as to the effect of the plaintiffs' mistake, might have arisen, had the action been against the party to whose use the money came; but as it was, we conceive that question had nothing to do with the case. The plaintiffs had no equity against the defendants, who, as agents, had received and paid over the money, in all good faith and honesty.

In *Milnes v. Duncan*,¹ the plaintiff had passed to the defendant a bill, which the latter made his own by neglecting to present it in due season. He then demanded of the plaintiff the amount of the bill, alleging that the bill was on an insufficient stamp, and was therefore void. The plaintiff's agent, after having twice examined the bill, paid the money; but it turned out that the bill was drawn in Ireland, and was on the appropriate stamp for such a bill, drawn in that country. This action was brought to recover back the money thus paid, and the court held that it was sustainable. Mr. justice Bayley stated the rule to be, that money paid under a mistake of law cannot be recovered back, but that if paid under a mistake of facts it may be recovered. The plaintiff in this case, he said, paid the amount under an impression that the bill was void. This, of itself, would look like a mistake of the law, but then that mistake might have originated, as the court assumed it did, in overlooking the fact of the place where the bill was drawn. It is said there was nothing about the bill calculated to raise any suspicion that it was drawn in Ireland. The bill, however, bore date of the place where it was drawn, and as the plaintiff's agent inspected it with especial reference to its validity, it is, perhaps, about as probable that he was not aware it made any difference whether the bill was drawn in England or in Ireland, as that he was ignorant of the fact that it was drawn in

¹ 6 Barn. & Cresw. 671.

Ireland. At any rate, if this was a case of *merè* mistake of fact, what is said of mistakes of law was wholly extra-judicial.

Bramston v. Robins,¹ was a case where a tenant had been allowed, during seventeen years, to deduct from his rent, on account of a payment for the land tax, a sum larger than the amount of the tax, which the landlord was liable to pay. The defendant, as bailiff of the landlord, distrained for rent in arrear,—being the excess which the tenant had deducted above the actual amount of the tax. This was an action of replevin, brought by the plaintiff, a partner of the assignee of the premises, since the assignment to whom, the full rent had been paid, without any deduction for the land tax. The excessive deduction complained of, took place, therefore, wholly under a former tenant. Chief justice Best attached great importance to this circumstance. The premises, he said, had come into other hands, no doubt under the usual assurance that all previous demands had been paid. The assignee's remedy against his assignor was inadequate, and, he observed, it would indeed be a hardship if the assignee were compellable to pay. Mr. justice Burrough said the demand was most unconscientious. The remark of the lord chief justice, that if the landlord knew, or had the means of knowing all the facts,—which he assumed to be the case here,—a mistake as to his legal rights would not entitle him to make this claim, was such called for; because, in the first place, there was no evidence or even intimation, so far as appears, of such a mistake, and next, had a mistake of the kind actually occurred, the landlord had no equity against the party whose goods were distrained.

There is a class of cases growing out of a similar subject matter with this last, where a tenant who has, for a

¹ 4 Bing. 11.

series of years, paid the full rent to his landlord, without deducting the property tax, as he had a right to do, has not been allowed to recover back the amount he might thus have deducted, or to set it off against subsequently accruing rent. These cases have been supposed to resolve themselves into an overpayment by mistake of law or of fact; and probably of the former. In the cases of *Wildey v. The Cooper's Company*, and *Atwood v. Lamprey*,¹ it does not appear why the tenant omitted to deduct the tax, nor is it stated on what ground his right to recover it back was denied. The later cases that are referred to as recognizing the doctrine of these two, do not, we think, afford much countenance to the idea, that they proceed on the ground of mistake of law. In *Nicholls v. Leeson*,² where an annuity, arising out of a family settlement,—a circumstance to which lord Hardwicke seems to have attached some weight,—had been paid for sixteen years, without deducting the land tax, his lordship refused to order the amount to be refunded, going, as he said, upon the reason of other cases, and on this general rule, that where an annuity is given to a relation for life, and it has been paid for any length of time, and no deduction made for the land tax, supposing no fraud on the part of the receiver, he would presume it had been so paid by mutual agreement. *Currie v. Goold*,³ was a case in which the plaintiff had, for seventeen years, paid the interest on a legacy without deducting the tax, and then claimed to deduct the whole from the interest of one year. The remark of the vice-chancellor, sir Thomas Plumer, that the plaintiff probably derived some advantage from the capital being suffered to remain with him, instead of being paid into court, and that he probably made no claim of the property tax, as an inducement to have the money in his

¹ Cited in *East v. Thornbury*, 3 P. Wms. 126, note.

² 3 Atk. 573.

³ 2 Madd. 163.

hands, does not stand well with the supposition that, in his opinion, the plaintiff's neglect to make the deduction, proceeded from ignorance of his right to make it. In *Smith v. Alsop*,¹ it was decided, that executors who had paid interest on a bond, without deducting the property tax, under a misrepresentation that the terms of the bond required it, could recover the amount of the tax, but that they could not recover in respect of a payment, made by their testator, the obligor in the bond, who, as Mr. baron Hullock observed, "possessed a perfect knowledge of the circumstances and of the law also." Of these cases, then, there is not one which professes to proceed on the ground of mistake of law, or in which, so far as appears, there was such a mistake.

There are cases which rest on considerations peculiar to themselves, and which, therefore, it falls not within our present purpose to examine at large. To cases of compromise of doubtful and doubted rights, we have already adverted.² In such cases, if the parties have acted with a full and correct understanding of the circumstances, and of the real character of the case considered as doubtful, a reasonable argument, fairly entered into, will be sustained.³

In cases of family arrangements, besides the element of compromise which enters into many of them, it is admitted that a stricter and more rigorous rule is applied, than in cases between mere strangers.⁴ The doctrine in respect to family arrangements, lord Eldon has stated to be, that where they have been fairly entered into, without conceal-

¹ McClell. 622.

² Ante, 163—5.

³ See *Naylor v. Winch*, 1 Sim. & Stu. 555, in which the argument was enforced. *Leonard v. Leonard*, 2 Ball & Beat, 171, in which it was set aside; and see *Taylor v. Rochfort*, 2 Ves. Sen. 281. *Gibbons v. Caunt*, 4 Ves. 840. *Underwood v. Brockman*, 4 Dana, 309.

⁴ *Stockley v. Stockley*, 1 Ves. & Bea. 23.

ment or imposition on either side, although the parties may have greatly misunderstood their situation, and mistaken their rights, a court of equity will not disturb the quiet which is the result of the arrangement. But where the transaction has been unfair, or there has been a mistake, though innocent, and the other party was accessory to it, or if what one knew, has been concealed from the other, who has thereby been misled, the court will interfere and set aside the agreement.¹ In that case, as well as in *Dunnage v. White*,² the agreement was rescinded. The cases where agreements have been sustained as family arrangements are numerous.³

Independent of cases of the kinds just mentioned, the English equity reports will be found very meagre in authorities, to show that relief will not be granted against mistakes of law. *Mildmay v. Hungerford*⁴ would seem to be an authority to that point, but the report gives only the bare result at which the court arrived, without stating at all the ground on which the decision proceeded. *Frank v. Frank*⁵ is sometimes cited to the same purpose. That, however, is commonly considered a case of family compromise,⁶ and, besides, its authority has been seriously questioned.⁷ In *Goodman v. Sayens*,⁸ the master of the rolls, sir Thomas Plumer, stated it as "admitted, that at law it is impossible to recover, after a voluntary payment with a knowledge of all the facts, though under a mistake

¹ *Gordon v. Gordon*, 3 Swanst. 400.

² 1 Swanst. 137.

³ See *Cann v. Cann*, 1 P. Wms. 723. *Stapilton v. Stapilton*, 1 Atk. 2. *Pullen v. Keady*, 2 Atk. 537. *Cory v. Cory*, 1 Ves. Sen. 19. *Stockley v. Stockley*, 1 Ves. & Bea. 23. *Clifton v. Cockburn*, 3 Myl. & K. 76. *Neale v. Neale*, 1 Keen, 672.

⁴ 2 Vern. 243.

⁵ 1 Cas. in Ch. 84.

⁶ See 1 Story, Eq. Jurisp. 147. note (4). 1 Swanst. 158.

⁷ Per lord Manners in *Leonard v. Leonard*, 2 Ball & Beat, 171.

⁸ 2 Jac. & Walk. 249.

in point of law." As that was a case of a bill to set aside an award, on the ground of partiality and misconduct of the arbitrators, and there was no pretence of a mistake of law, there would seem to have been no very urgent call for the remark, whether it be correct or otherwise. In *Marshall v. Collett*,¹ the plaintiff had joined in a sale of certain stocks, supposing herself entitled to only one third of them, and a life interest in the residue; but she afterwards claimed the whole as her absolute property, and alleged in her bill, that she entered into the contract of sale under a misconception of her rights. Lord Abinger held, that she was not entitled to the whole, and said it was not necessary to go into the other part of the case. He, however, proceeded to state it as a maxim of equity, that contracts shall not be set aside on account of mistakes of law, though they will be for mistakes of fact. So far as that case was concerned, the statement of any such rule was, obviously, not demanded.

There are cases where the parties having in view a particular object, have misjudged the legal effect of the means or instruments chosen for the accomplishment of that object. In such cases, the courts have refused to interfere, on the very satisfactory ground, that it is not their province to make contracts for parties, but to effectuate those which the parties have made for themselves. Where there has been a mistake in drawing up an instrument, so that it does not express truly the terms of the actual agreement, courts of equity may make the instrument what it was intended to be; but they cannot give to an instrument, which is the very one, and precisely what the parties intended it should be, a legal effect with which the law has not clothed it; nor can they substitute in its stead another instrument having a different effect.² In these cases, it

¹ 1 Younge & Coll. 232.

² See *Underhill v. Howard*, 10 Ves. 209; 1 Story, Eq. Jurisp. 128.

may have been the misfortune of the party affected, not to have done something different from what he actually did; but it does not follow, therefore, that the court is to do that something for him. It is not, however, because the mistake is a mistake of the law, that relief is refused. If it were a mistake of fact, it would be equally fatal, in a similar case. Suppose a man, at an auction, intending to purchase a certain article, bids for it, and actually believes it to rest upon himself as the highest bidder; but it is struck off to another of whose bid he chanced not to be aware. Could any court say he should have the article, nevertheless? Clearly not. Yet he intended to have it, and verily believed he had taken the proper steps to secure it. It was his misfortune to have been under a mistake. Among cases of the kind referred to, may be mentioned that of *lord Innham v. Child*,¹ in which the parties would have introduced into their agreement a certain clause, but omitted it from an erroneous impression as to the effect of its insertion; *Cockrell v. Cholmeley*,² where a power was imperfectly executed; *Dickerson v. Gilliland*,³ in which a party had failed to perform a condition precedent; and, especially, the case of *Hunt v. Rousmaniere*,⁴ in which the instrument selected, as things turned out, proved inadequate to accomplish the end designed.

In substantially the same condition are cases where an obligee has released one of two joint and several obligors, supposing that the other would remain bound. Here, the act of release has a different effect from what the party contemplated. He intended merely to discharge one of the obligors; the effect is to discharge both. For, as was stated by chief justice Eyre, there is but one duty extending to both obligors, and a discharge of one, on satisfaction made

¹ 1 Bro. ch. 92.

² 1 Russ. & Nyl. 418.

³ 1 Cow. 481; and see *Sims v. Lyle*, 4 Wash. C. C. 321.

⁴ 2 Mason, 342; 8 Wheat. 184; 3 Mason, 294; 1 Pet. S. C. R. 1.

by one, is a discharge of both.¹ By the release of one of the obligors, the contract becomes essentially a different one from that which was entered into by the remaining obligors. So long, therefore, as the release continues in force, it is impossible for any court to obviate its regular legal effect. Accordingly, it is laid down that, in such a case, a court of equity will not enforce the contract against the remaining obligors.² But whether the release should not be set aside by a court of equity, in a case of this kind, is a question which should depend on the general equity, and all the circumstances of each particular case. In a suitable case, it would seem there would be no difficulty in doing this.³

In the case of *Hunt v. Rousmaniere*, which, in its various stages, afforded occasion for an ample discussion of the subject of mistakes of law, the parties had intended to secure the repayment of a loan of money, by means of a lien on certain vessels. For this purpose, the debtor executed a power of attorney, authorizing the creditor to sell his interest in the vessels. While things were in this state, the debtor died, and thereby the power of attorney became extinguished. During the lifetime of the parties, the instrument chosen was a good and effectual instrument for the object contemplated. But it was designed to be a valid security in every event, and in implicitly assuming that it would be such, the parties mistook its true legal force. There was, then, a mistake of law, which was at the bottom of all the difficulty. But that mistake lay too far back in the transaction, to be reached by any court. Nothing could be done, without absolutely making a new contract

¹ *Cheetham v. Ward*, 1 Bos. & Pul. 630; see also *Nicholson v. Revill*, 4 Adol. & El. 675.

² Com. Dig. Chancery, 3 F. 8; *Harman v. Cam. Vin. Ab. Chancery*, N. 3; 1 Story, Eq. Jurisp. 124.

³ See *Joy v. Wirtz*, 1 Wash. C. C. R. 407.

for the parties. They had agreed, not that a security should be given which should be valid under all circumstances,—though they meant to have such a one; but their agreement was, that a power of attorney should be given, which, they erroneously supposed, would accomplish their purpose. The actual agreement of the parties was fully effectuated. But the instrument selected had not the legal force they attributed to it. They meant it to be an instrument, which should possess an inherent energy; in this event, it proved perfectly impotent. Here, then, was a certain thing to be accomplished. There must be an agent or instrument to accomplish it. The parties had failed to provide such an instrument, and it is wholly immaterial, as to the results, whether they had a better or a worse excuse for failing so to do. The consequence must be, that the thing could not be done, for there was nothing to do it.

In delivering the opinion of the court,¹ chief justice Marshall evidently inclined to the doctrine, that mistakes of law may be a proper subject for relief. And his remark that “we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity,” we consider important, as it goes to show what, in his opinion, had not been decided by the cases up to that time. When the case came again before the same court,² Mr. justice Washington, who delivered the opinion of the court, manifested a decided bearing against affording relief in cases of a mistake of law, generally; but he said expressly, “it is not the intention of the court, in the case now under consideration, to lay it down that there may not be cases, in which a court of equity will relieve against a plain mistake, arising from ignorance of the law.” Besides, it would seem to detract very much from this case as an authority against granting redress on account of mistake

¹ 8 Wheat. 174.² 1 Pet. S. C. R. 1.

of law, that the court thought, "if all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff, would be sufficient to induce the court to leave the parties where the law had placed them."

There has been a more recent case¹ on the subject, in the supreme court, in which, it has been said, "the main question was, whether a mistake of law was relievable in equity, it being stripped of all other circumstances." It is admitted that mistake as to legal liability was the main ground on which the bill prayed for relief. But in the view which the court took of the case, we cannot concede that the subject of mistake was the main question, or that it was a material question, or even that there was any occasion for the court to consider it. In that case, a party had, in taking up a dishonored bill, included in the settlement ten per cent. damages on the amount of it, under the belief, as was alleged, that such damages were required by a statute of Kentucky; but according to the construction subsequently put upon that statute, it did not cover this case. The party now sought to be relieved from the amount of damages thus included. A preliminary and vital question was, whether the damages had been paid;—whether the transaction, at the time the original bill was taken up, was to be regarded as an actual payment of the bill and damages, or merely as a renewal of the security. The court held it to be a payment. This opened the way for two consequences, either of which was fatal to the whole case. In the first place, though the court were of opinion that the damages in question could not have been demanded under the statute, yet they considered the bill as subject to damages and reëxchange by the law merchants, and said that, in the absence of any proof to the contrary,

¹ *United States Bank v. Daniel*, 12 Pet. 32.

² 1 Story, *Eq. Jurisp.* 154, note, (2d ed.)

it must be presumed ten per cent. was a fair compensation. They thought, therefore, the plaintiffs had, at least, as high an equity as the defendant. Now, nobody supposes that money which is fairly and justly due, and which the other can honestly retain, can be recovered back, when once it has been paid. If, then, under such a state of facts, the money had been actually paid, there was an end of the case, at once. Another consequence of holding the transaction in question to be a payment, was, that as the bill in equity was not filed till more than eight years after that transaction, all remedy was, years before, irrecoverably gone, by the statute of limitation. Under these circumstances, admitting that there was a mistake, which, to say the least, is doubtful, we suppose that no mistake, whether of law, or of any thing else, could possibly help the defendant's case. The court, however, went into the subject of mistakes of law, and expressed themselves in terms sufficiently decided. But how, considering the language above quoted from the case referred to, they could have arrived at the conclusion, "that mere mistakes of law are not remediable, is well established, as was declared by this court in *Hunt v. Rousmaniere*, 1 Peters, 15," we confess ourselves wholly unable to divine. In view of this case, it has been remarked, that "so far as the courts of the United States are concerned, the question may be deemed finally at rest."¹ If this be so, we cannot but regard it as exceedingly unfortunate, that an occasion for putting at rest a question confessedly so important, should have been sought in a case where there was so slight a demand for a decision of it.

We will next notice the New York decisions on this subject. In *Shotwell v. Murray*,² the defendant having two judgments of different dates, sold the land of the debtor

¹ 1 Story Eq. Jurisp. 154, note, (2d ed.)

² 1 Johns. Ch. 512.

under the junior judgment, and the plaintiff became the purchaser, though he knew, previously, of the existence of both the judgments. Afterwards, the defendant issued execution on the other judgment, and was proceeding to make a second sale of the land. The plaintiff filed his bill for an injunction, alleging that he purchased the land in full confidence that it would, by the first sale, be exonerated from all further lien by reason of the judgments in question. The bill was dismissed. Mr. chancellor Kent said, he assumed it as a settled principle of law and sound policy, that "a person cannot be permitted to disavow, or avoid the operation of an agreement, entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts." He, however, observed, that admitting all that was alleged, the mistake was only as to a collateral point, and that the purchaser was seeking, under that pretence, not indeed to vacate the sale, but to divest the defendant of his rights;—a course of proceedings, certainly, which could claim no especial favor in a court of equity. Moreover, there does not appear to have been sufficient evidence of any mistake.

The case of *Lyon v. Richmond*¹ was, in no proper sense, a case of mistake of law. There a bill was filed for an injunction, on the ground that the plaintiffs had, by unfair and oppressive measures on the part of some of the defendants, been prevented from bringing a writ of error on a certain judgment, which there was reason to suppose, from a subsequent decision, would have been reversed, had a writ of error been brought. The question before the court would seem to have been, whether, as was alleged, there had been any unfair practices used. The chancellor said he had nothing to do with the question, whether the court would have reversed the decision, had a writ of error been

¹ 2 Johns. Ch. 51.

prosecuted, but he proceeded to state, that "a subsequent decision of a higher court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect and overthrow such settlement." This language is often quoted, and we admit fully its force and justness; but what, in particular, it has to do with mistakes of law, is not so obvious. The law we understand to be what the regularly constituted judicial tribunals have declared it to be; and when it has been once expounded, that remains the law, until a different exposition has been given. The new exposition operates like the repeal of an old statute and the enactment of a new one; in which case, every deed is to be judged by the law in whose time it was done. The court took occasion to give some salutary cautions against mistaking the law, with a knowledge of which, it was said, every man is to be charged at his peril. The decree for dismissing the bill in this case, was reversed, by a bare majority, in the court of errors, on the ground that an unconscientious advantage had been taken of the circumstances of the plaintiffs.¹ It has been said,² however, that this decision left untouched the doctrine of the chancellor, in respect to mistakes of law; which is very possible if the court confined themselves to the case before them.

In *Storrs v. Barker*,³ the defendant had brought an action of ejectment for certain land, which he claimed as heir at law of his daughter. This land, the daughter, a married woman, had, with the approbation of her father's family, devised to her husband, Foster, who after her death occupied the same, claiming under his wife's will, and finally sold it to the plaintiff, for a full and valuable consideration.

¹ *Lyon v. Tallmadge*, 14 Johns. 526.

² *Champlin v. Laytin*, 18 Wend. 407.

³ 6 Johns. Ch. 166.

The defendant repeatedly advised Foster to sell and the plaintiff to buy; told Foster he thought his title good under the will; and when asked, on behalf of Storrs, whether he did not claim the land by inheritance, replied in the negative. These are strong circumstances, in the face of which to attempt to turn another out of possession of land thus purchased, and peaceably enjoyed for several years. The defendant's attention had been again and again directed to the subject, he was asked expressly, by one who had a right to know, whether he did not claim the land by the very title he afterwards set up; and then was the time for him to inform himself of his rights. In a case of this kind, it would be against all conscience to allow a man, on any pretence, unless fraud had been practised upon him, to dispossess another of the very property for which he had himself induced him to pay his money. It is worth noticing, that in this, which is the latest of the three cases, the chancellor qualified, very materially, the doctrine he had before expressed as absolute. "It is rarely," he says, "that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief;" and again, "ignorance of the law, with knowledge of the facts, cannot, generally, be set up as a defence."

Clarke v. Duches,¹ was an action to recover back a small excess of rent, which, in ignorance of his rights, it was alleged, had been overpaid by the tenant, for a time running back somewhat beyond the memory of man. The court said that, since the last settlement, the plaintiff had not paid as much as he owed; and that the statute of limitations attached to all accounts prior to that time. This would seem to cover the whole ground. But though the court considered this view of the case conclusive, they thought proper, *ex abundante cautela*, to go into a discussion

¹ 9 Cow. R. 674.

of the subject of mistakes of law. The idea of relieving against such mistakes, they discountenanced in most decided and unequivocal terms. In another case,¹ which, however, the court could not "consider as a case of mistake of fact or of law," it was stated to be "now generally conceded, that the mistake must be a mistake of facts and not of law," to entitle a party to recover back money.

There have been a few cases relating to the same subject, in other states. Among other matters, this was much considered in a case in Alabama;² and the court expressed themselves strongly against granting relief on account of mistakes of law. There were several cases of the same kind. The plaintiffs believing they might, under a particular statute of the state, lawfully stipulate for any rate of interest that should be agreed on by the parties, had given their notes, bearing an exorbitant interest, and when their notes become due, had either paid them voluntarily, or suffered judgment to go against them without defence. Some years afterwards, it was decided, that the statute in question did not authorize an unlimited rate of interest in cases like these. Inasmuch as before the plaintiffs filed their bills for relief, their remedy at law was barred by the statute of limitations, and as they had a good legal defence at the time they paid the money; as no fraud was shown, and the notes had been paid in exact conformity to the original intention of all parties, the court held that there was no cause for interference.

In *Wheaton v. Wheaton*,³ a bill was filed to enjoin proceedings, in an action at law, on a note. The court said the mistake, if any, was simply that the plaintiff mistook the legal effect of a plain note of hand, and ignorantly supposed a note, payable by the terms of it in three years, to

¹ *Mowatt v. Wright*, 1 Wend. 355.

² *Jones v. Watkins*, 1 Stew. 181.

³ 9 Conn. 96.

be in law a note payable at the death of the obligee, and then not to be paid, but delivered up to him as his share of his father's estate. They thought it would be not a little difficult to procure evidence of a mistake of such a character. We think so too. But if it could be done, it should seem the party would be entitled to relief under another kind of equity than mistake.

In *Pinkham v. Gear*,¹ chief justice Richardson regarded it as well settled, that no man can avoid his contract by an allegation, that he made it under a misapprehension of the law. By a mere allegation, without proof, undoubtedly he cannot. There are some other cases in which language is found favoring the doctrine, that mistakes of law are inexcusable. The subject, however, was so collateral and so slightly touched upon in them, that it is not necessary to do more than to refer to the cases.²

What, then, is the conclusion to be drawn from the authorities on this side of the question? We admit that, if those were the only requisites, there are cases enough, and the language found in some of them is strong enough to sustain any doctrine. But a very large proportion of that language was used; as we have endeavored to show, when it was not called for by the case under consideration; and, consequently, in point of authority, it rises little above mere *dicta* of the judges who used it. Many of the cases were confessedly put on other grounds, and most, if not all of them might have been;—for, undoubtedly, they were, in general, decided correctly, under the circumstances. We submit, on the whole, that in view of the reasoning on

¹ 3 New Hamp. 163.

² See *Hepburn v. Dunlop*, 1 Wheat. 179; *Elliott v. Swartwort*, 10 Pet. 137; *Brown v. Armistead*, 6 Rand. 593; *Williams v. Hodgson*, 2 Har. & Johns. 474; *Dickens v. Jones*, 6 Yerg. 483; *Hubbard v. Martin*, 8 Yerg. 498; *Buttle v. Griffin*, 4 Pick. 6; *Ladd v. Kenney*, 2 New Hamp. 340; *Norton v. Mar-den*, 3 Shepley, 45.

which the cases on this side proceed, and the variety of other considerations which entered into them all, rendering the question of mistake commonly quite a subordinate one in the actual decision, the language they hold is not sufficient to establish a doctrine, the effect of which, if it were carried out into practice might, and often would be, to take one man's property from him and give it to another. There are not decisions directly upon the point, to make out the doctrine.

And we think it can be shown, that even those judges, who have been esteemed its greatest champions, and on whose authority it most rests, Mr. justice Buller, for instance, and lord Ellenborough, the *duo fulmina belli* on that side, did not hold the unqualified doctrine that mistakes of law can never be relieved. That very opinion of the first named judge, in *Lowry v. Bourdieu*, carries with it at once its bane and antidote. For, while he says, if the law was mistaken, the rule applies, *ignorantia juris non excusat*, he, at the same time, lays great stress on the circumstance that the contract was executed; the risk, such as it was, having been completely run. But, he says, had the plaintiffs brought their action before the risk was over, and the voyage finished, they might have had a ground for the demand. Yet the money would have been paid equally under a mistake of the law. This view of Mr. justice Buller's opinion on this subject, is greatly confirmed by what he said in the case of *Malcolm v. Fullerton*.¹ There the defendant had paid a sum of money to the plaintiffs, who brought this action to recover a further amount, which they claimed as due. Afterwards, it was agreed to refer all matters in dispute to an arbitrator, who awarded a certain sum to be paid by the plaintiffs to the defendant. Mr. justice Buller held, that the defendant was not bound by the payment

¹ 2 T. R. 645.

made by him, it having been made by mistake. The precise nature of the mistake, further than that it was a mistake in respect to the party's obligation to pay the sum demanded, does not appear. Nor is it material for our present purpose; for the learned judge added, "the only payment by which a party is bound, is that which is made into court under a rule of court. That is a payment on record, and the party can never recover it, though it afterwards appear that he paid it wrongfully; but that does not extend to payments between party and party." From this rule, qualified as it fairly is by the concluding clause, we infer the opinion of sir Francis Buller to have been, that money paid by one party to another, without obligation, may, in a case where justice requires it, be recovered back.

That lord Ellenborough did not regard it as a rule of universal application, that mistakes of law are irremediable, is proved by what he said in the case of *Perrott v. Perrott*.¹ In that case, Mrs. Territt had executed a deed appointing the disposition of certain property; but afterwards, having made her will, referring to that deed, had cut off her name and seal from the deed, saying at the time, that the purport of it was fully met in her will. The court decided at once that the deed was revocable, but they took time to consider what lord Ellenborough said was the only question with them, "whether her having cancelled the deed under a mistake in point of law, as to the effect of her will, which she supposed would operate to the same purpose as the deed, would be an effectual cancellation." Afterwards, his lordship, in delivering the judgment of the court, said, "Mrs. Territt mistook either the contents of her will, which would be a mistake of fact, or its legal operation, which would be a mistake in law; and in either case we think the mistake annulled the cancellation." And he added, that, it being

¹ 14 East, 422.

clearly established that a mistake in point of fact may destroy the effect of a cancellation, it seems difficult, upon principle, to say that a mistake in point of law should not have the same operation; and he cited the case of *Onions v. Tyren*,¹ as a strong authority that a mistake of law may have that effect.

It appears also clearly that these same judges did not consider the rule in question as applicable to executory contracts. In *Lowry v. Bourdieu*, Mr. justice Buller said, there is a sound distinction between contracts executed and executory; and he intimated pretty distinctly, that in that case the money might have been recovered back, had an action been brought while the contract was executory; though in lord Ellenborough's estimation, it was paid "under a mere mistake of law." In *Herbert v. Champion*,² an underwriter, upon a full disclosure of facts, had made an adjustment on a policy of insurance, and signed a promise to pay the amount of the loss. Lord Ellenborough said, "that when upon a dispute the money is paid, it cannot be recovered back without proof of fraud; but a promise to pay will not, in general, be binding, unless founded on a previous liability. An underwriter, until he has paid the money, is at liberty to avail himself of any defence which the facts, or the law, of the case will furnish." The distinction taken in this case is noticed with approbation by Mr. justice Gibbs.³ Now, an adjustment with a promise to pay, lord chief justice Lee⁴ "considered as a note of hand;" and Mr. sergeant Marshall says, "this, like a note of hand, is *prima facie* evidence of a debt."⁵ Yet lord Ellenborough, Marshall, and Kenyon,⁶ all agree that an adjustment may be impeached

¹ 1 P. Wms. 343.

² 1 Camp. 134.

³ In *Brisbane v. Dacres*, 5 Taunt. 143.

⁴ *Hog v. Gouldney*, Beaw. Lex. Merc. 311.

⁵ Marsh. Ins. 634.

⁶ *Rogers v. Maylor*, Park, Ins 163; *Christian v. Coombe*, 2 Esp. 489.

by the underwriter, by showing it to have been made under "any misconception of the law or of facts." How this doctrine, and especially, how the language of lord Ellenborough in *Herbert v. Champion* is to be reconciled with the decision of the court in *Stevens v. Lynch*,¹ we are not concerned to inquire.

We will now advert to the authorities on the other side of the question. In *Farmen v. Arundel*,² which was an action for money had and received, chief justice De Grey said, "where money is paid on a mistake either of fact or of law, or by deceit, the action will certainly lie." It has been said that the case not only did not call for the *dictum*, but is in direct hostility with it.³ That might be so, if you took the rule without the qualification expressly stated in connection with it, that "the proposition is not universal, but money due in point of honor or conscience, though a man is not compellable to pay it, yet if paid shall not be recovered back." The decision of the case, so far from being inconsistent with the whole doctrine thus laid down, is strictly conformable to it. For, without deciding that the payment of the money could not have been enforced even by the defendant, the court considered it an honest debt; and, therefore, on their rule, it could not be recovered back, whether it could have been originally demanded or not. To say the least, the language used in this case fairly implies that the court knew of no such rule as that mistakes of law are irremediable.

Ancher v. The Bank of England,⁴ is an authority on the same side. There the plaintiffs had drawn a bill in favor of a person who endorsed it in certain terms, but after its ac-

¹ 12 East, 38. As to the distinction between contracts executed and executory, see also *Read v. Long*, 4 Yerg. 68; *Burn v. Winthrop*, 4 John. Ch. 329; *Ellison v. Ellison*, 6 Ves. 662.

² 2 W. Blacks. 824.

³ In *Clarke v. Dutcher*, 9 Cow. 674.

⁴ 2 Dougl. 637.

ceptance a forged endorsement, in favor of the party to whose credit the bill was to be set, was written upon it, and it was discounted by the defendant in the ordinary course of business. When the bill fell due, the acceptors having become insolvent, a friend or agent of the plaintiffs paid it for their honor, as drawers. The forgery having been discovered, the action for money had and received was brought, on the ground that the bill was not negotiable by reason of the first endorsement being restricted, and that it was, therefore, discounted by the defendants in their own wrong, and the money to take it up paid by mistake. The case was treated as if the plaintiffs had paid the bill themselves, they having adopted the act of the person who paid it. It was not denied that the money could not, simply on the ground of the forgery, be recovered back from an innocent endorsee. But lord Mansfield said, "the whole turns on the question whether the bill continued negotiable;" and he and two of the other judges held, that its negotiability was restrained by the first endorsement. Mr. justice Buller thought otherwise. The first endorsement being thus held restricted, it was the negligence of the defendants to have discounted the bill, and the plaintiffs were under no legal obligation to pay it. The money, however, had been paid, and the plaintiffs were allowed to recover it back. We consider this a plain case of a payment made under a mistake of the law, on a misapprehension of legal liability. The right to recover was put expressly upon the ground of mistake, and there was no pretence of any mistake of the facts, unless it were in respect to the forgery of the last endorsement, and that was immaterial, since the first being restricted, a subsequent one, though genuine, would have been equally ineffectual to charge the drawers.

In *Bize v. Dickason*,¹ we find laid down by lord Mans-

¹ 1 T. R. 285.

field, in its amplitude and exactness, substantially the same doctrine as that stated by chief justice De Grey in *Farmer v. Arundel*. "The rule," lord Mansfield says, "has always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back;" and he instances the case of a debt barred by the statute of limitations, or contracted during infancy. "But," he continues, "where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

But Mr. justice Gibbs¹ cannot think lord Mansfield said "mistake of law." Unquestionably he said "mistake;" and of what kind the mistake was, may, perhaps, be determined as safely from the case itself, as from the conjectures of learned judges, drawn from extrinsic circumstances, to suit preconceived opinions. The plaintiff had paid a sum of money to the defendants, assignees of a bankrupt, without claiming, as he might have done, the right to set off against the demand which was due to him from the bankrupt. He now brought an action to recover back this latter amount, as paid under a mistaken idea, without making the deduction; and he was allowed to recover. The rule stated in this case, Mr. justice Gibbs¹ spoke of as "lord Mansfield's *dictum*." We consider it a solemn decision of the court of king's bench, directly to the point, that money paid under a mistake or misapprehension of legal rights and liabilities, when it was not justly due, may be recovered back.

Perrott v. Perrott,² which is a strong authority to the point that mistakes of law are relievable, we have already sufficiently considered. The case of *Daw v. Parsons*,³ is by no means an unimportant one in this connection. That was

¹ In *Brisbane v. Dacres*, 5 Taunt. 143.

² 14 East, 422.

³ 2 B. & Ald. 562.

an action by a sheriff to recover fees for official services. The defendant's clerk had previously paid the plaintiff, on his demanding it as of right for other services, a sum which the defendant regarded as exorbitant, and he now claimed to set off the whole or a part of the sum thus paid. The fees in question were no higher than had, for many years, usually been paid in that county. The plaintiff took the position that this was a payment made with a full knowledge of all the facts, though under a misapprehension as to legal liability, and could not be recovered back, and so was not the subject of set-off. The plaintiff was nonsuited, and on a motion to set aside the nonsuit, chief justice Abbott said this was in substance like an action by the sheriff to recover his fees, and if he did not make out his title to them, the defendant would be entitled to set off the sum which had been overpaid.

There are several cases in equity much in point, on the same side. *Turner v. Turner*,¹ decided by lord Nottingham, seems to be a direct authority in favor of granting relief against mistakes of law. But the circumstances of the case and the grounds of the decision are not so distinctly stated, that much reliance can, perhaps, be safely placed on it as an authority.

In *Lansdowne v. Lansdowne** "a bond and indentures, obtained by mistake and misrepresentation of the law, were ordered to be given up to be cancelled." That case arose out of a controversy between the defendant's father, who was the youngest and the sole survivor of four brothers, and the plaintiff, the son and heir at law of the eldest of the four, respecting the right to the estate of the third brother; and the controversy was settled by an agreement to divide the property. The case is cited, in the English books, without

¹ 2 Rep. in Ch. 154.

* *Mosley*, 364, 2 Jac. & Walp. 205. S. C.

any intimation of doubt as to its authority.¹ It has, however, been sometimes questioned in this country, and particularly by the supreme court in the case of *Hunt v. Rousmaniere*. It would have given additional weight to their criticisms, had that learned court shown a fresher recollection of the circumstances of the case. They say² the plaintiff acted under the pressure of an award. But Hughes, whom the justices consulted, did not act as an arbitrator; he only gave an opinion, and in that opinion he had so little confidence that he advised them to take further counsel. The suggestion that the plaintiff might have been ignorant of the fact that he was the eldest son, or rather the heir at law of the eldest of the four brothers, besides being extremely improbable in itself, would seem to be pretty satisfactorily met by the reason assigned by Hughes for his opinion, namely, that lands could not *ascend*. The case appears to have been one of compromise of a double right, but that right was not in reality doubtful. And here lay the mistake, which was a mistake of the law. The parties assumed as doubtful, a right which was perfectly clear, and their agreement proceeded on the ground of this mistake. In this view of the case, the decision is in entire accordance with the doctrine stated by the master of the rolls, sir John Leach, in a recent case.³ If such an acquirement as this was capable of being sustained at all, it must have been as a family arrangement, but such it could scarcely be considered.

In the case of *Pusey v. Desbouvrie*,⁴ a freeman of London, having a wife, son and daughter, in his will gave his daughter £10,000 on condition that she should release her orphanage part, and all her claim on his estate by the custom of London or otherwise, and made his son executor.

¹ See Jeremy on Eq. Jurisd. 366; Newland on Contr. 432; 2 Powell on Contr. 196; 1 Madd. Ch. Pr. 74; 2 Ball & Beat. 184, note (a).

² 1 Pet. S. C. 1.

³ *Naylor v. Winch*, 1 Sim. & Stu. 555.

⁴ 3 P. Wms. 315.

After the father's death, the daughter accepted the legacy, and executed a release, her brother having previously informed her that she was entitled to have an account taken of her father's personal estate, and to claim her orphanage part. But she declared she would accept the legacy, saying that was a sufficient provision for any young woman. The plaintiff, however, whom she afterwards married, it seems thought otherwise, and he filed a bill to have the release set aside, alleging that the mother having been compounded with, and the son fully advanced in his father's lifetime, the daughter was entitled to one half of her father's personal estate, which half amounted to upwards of £40,000; and he insisted that the release ought not to be used, in a court of equity, to bar the daughter of that right which she did not know she herself had, and much less intended to give away. To this it was replied, that the daughter had executed the release freely and without any misrepresentation, and that if she was not informed of the custom of London, it was her own fault and not that of her brother. Here, then, was an issue directly upon the point, whether or not she was chargeable, at her peril, with a knowledge of her own rights. Lord chancellor Talbot said, he did not see that any fraud was made use of, but still it seemed hard that a young woman should suffer for her ignorance of the law or of the custom of London, or that the other side should take advantage of that ignorance. And, he observed, if the courts themselves had not, till very lately, agreed in what proportions these customary parts should go, the daughter surely might well be ignorant of her right, and ought not to suffer, or give others any advantage by such her ignorance. This is the plain, honest, common sense view of the matter, and it does not much countenance the idea, that lord Talbot considered every body chargeable with legal infallibility.

Lord Hardwicke once said, "where parties are at liberty

to surcharge and falsify, they are not confined to errors of fact, but may take advantage of errors of law."¹ And in the case of *Penn v. lord Baltimore*,² as we are told by chief justice Shippen,³ who was present at the argument, lord Hardwicke said, if lord Baltimore had made the argument in question under a mistake of his right to another degree of latitude, he ought to be relieved. In another case,⁴ where the mistake originated in a want of skill in drawing a bond, and ignorance, probably, of the legal effect of the instrument, the same learned chancellor spoke of mistake, generally, as "a head of equity on which the court always relieve." From this language of lord Hardwicke, it would seem he was not aware of any such inflexible rule as that mistakes of law are never remediable. What he said in *Pullen v. Ready*,⁵ is not inconsistent with this view; for, besides that the case was one of family arrangement, the court were asked to set up a forfeiture, which had been waived by the parties.

In *Brigham v. Brigham*,⁶ the plaintiff had purchased of the defendant, land which was his own already under a devise. The plaintiff alleged in his bill, that he purchased the estate, being ignorant of the law, and persuaded by the defendant and his scrivener and conveyancer, that the devisor had no power to make the devise. The defendant replied, that the plaintiff should have been better advised before he parted with his money. The master of the rolls, sir William Fortescue, sitting for lord Hardwicke, decided in favor of the plaintiff; "for though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money

¹ *Roberts v. Kuffin*, 2 Atk. 112.

² Reported in 1 Ves. Sen. 444.

³ In *Levy v. Bank of United States*, 1 Bin. 27.

⁴ *Simpson v. Vaughan*, 2 Atk. 31.

⁵ 2 Atk. 587.

⁶ 1 Ves. Sen. 126; *Belt's Sup.* 79.

in consideration of an estate to which he had no right ;"—a reason which commends itself to our notions of justice.

We cannot regard this as a case of compromise, as it has been considered.¹ It does not appear, that, at the time of the sale, either party had any doubt whose the land was. The plaintiff knew there was a will giving it to him, but when the transaction took place, he appears to have been satisfied that the will was good for nothing ; and the case finds, that the defendant, in good faith, thought the right his. There is nothing indicating an intention of the parties to divide the stake, and run each his own risk as to the right. The one does not say, I will give, and the other, I will take so much, be the right where it may. But they appear to have proceeded upon the implicit belief that the right was in the one, whereas, in fact, it was in the other. The case stands on the intention of the parties. It is not to be supposed that the plaintiff intended to purchase what was already his own, or the defendant to sell what did not belong to him. The principle is the same as that stated by Mr. justice Story,² that "a party can hardly be said to intend to part with a right or title, of whose existence he is wholly ignorant." And whether the party never suspected he had any right, or has settled down implicitly in the erroneous belief that he has none, would seem to be immaterial.

*M'Carthy v. Decaix*³ is a recent case, decided by lord Brougham. There a native of Denmark had married an English woman, in England, and had afterwards been divorced from her in Denmark,—which, by the law of England, is no divorce. After the death of the wife, her husband, believing the divorce valid, had, in a correspondence with her sister, who represented her as having died poor, renounced all claim to his wife's property, in favor of her family. The lord chancellor said, had he known that he

¹ 1 Story, Eq. Jurisp. 138.

² Ibid, 135.

³ 2 Russ. & Myl. 614.

was still her husband and liable for her debts, this knowledge might have altered his intention; "for if a man does an act under ignorance, the removal of which might have made him come to a different determination, there is an end of the matter. What he has done, was done in ignorance of law, possibly of facts, but, in a case of this kind, that would be one and the same thing."

In *Clifton v. Cockburn*,¹ though the case did not turn principally on that point, we have a pretty intelligible intimation of lord Brougham's views in respect to the distinction between error of law and error of fact. "The distinction," he says, "is somewhat more easy to lay down in general terms, than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one, and I think I could, without much difficulty, put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule, and refuse to relieve against an error of law."

In a very late case,² when the court were disposed to go all justifiable lengths to protect the plaintiff, in a case which they considered as one of the most unfortunate that ever occurred in a court of justice, but could do nothing, since the defendant had the law with him, it was attempted to set up certain acts of the defendant, in confirmation of the plaintiff's title. But the master of the rolls, sir John Leach, said, "no man can be held by any act of his, to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequences, in point of law; and here there is no proof that the defendant, at the time of the acts referred to, was aware of the law on the subject." What need was there of such proof, or what mattered it whether the de-

¹ 3 Myl. & Keen, 76.

² *Cockerell v. Cholmeley*, 1 Younge & Coll. 418.

fendant was aware of the consequences of his acts, if the doctrine be, that every man is imperatively presumed to know, and at his peril must know the law in all cases. The master of the rolls certainly could not have understood that such was the doctrine.

We will now look at the American cases which we regard as authorities, to show that mistakes of law are remediable. In Massachusetts, it is understood to have been decided, that money, paid under a mistake of law, may be recovered back; and, at all events, that a promise to pay, under a mistake of law, cannot be enforced;¹ and such Mr. Dane regards as the better doctrine.² In the case of *Haven v. Foster*,³ the question whether money, paid in ignorance of the law, can be recovered back, was very learnedly discussed by counsel. The court professed to leave the question undecided, but allowed the plaintiff to recover, on the ground that the law of descents in New York was to be regarded as a fact, and, consequently, that ignorance of it was ignorance of a fact and not of law. The argument, adduced from analogy, that the courts of our state are not presumed to know the laws of any other state, we cannot deem to be precisely in point. It is the business of courts to administer justice within the state by whose authority they are constituted. But an individual must look to his rights, wherever they may be called in question, and by whatever laws they may be governed. It would seem, that if a man is bound to know any laws affecting his rights *civiliter*, it should be those which concern and control the right and disposal of his property. Now, in respect that the plaintiff in this case lived in Massachusetts, the statute of descents in New York was to him a foreign law; but it was not so in respect to the property, out of the disposition of which the case arose, for that was situated in New York.

¹ 1 Story Eq. Jurisp. 122, note; 1 Dan. Ab. ch. 9. art. 3. § 2.

² 3 Dan. Ab. ch. 75. art. 19. § 8.

³ 9 Pick. 112.

There is a late case¹ in New York, which is to be noticed. It came first before vice chancellor McCoun, who thought the authorities sufficient to establish the position, that a contract entered into, as he considered this to have been, under a mutual misconception of legal rights, amounting to a mistake of law, in both parties, and going to defeat the true end of the contract, is as liable to be set aside as a contract founded on mistake of facts. The chancellor¹ affirmed the decree of the court below, but he could not regard the correctness of the decision as turning on the question, whether or not the court could relieve against a mistake of law merely :—a point on which he did not “wish to be understood as expressing any opinion, one way or the other.” The case was afterwards carried to the court of errors,² where the decree was again affirmed, unanimously. Mr. justice Bronson, who delivered an opinion in the case, considered the parties as having contracted under a mutual mistake, which, on the part of the appellants, he regarded as a mistake of law, but as a mistake of fact on that of the appellee, who was the party seeking relief. He went into a discussion, at large, as to the effect of mistakes of law, and was very decided in the opinion, that such mistakes are beyond all relief. Mr. senator Paige indorsed the doctrine of the vice-chancellor, and he could “not see any good sense in the distinction of granting relief against mistakes of fact and refusing it in cases of acknowledged mistakes of law.” These two were the only opinions delivered in the case, and how many of the court adopted the doctrine of the one, and how many that of the other, does not appear. The marginal note has it, “whether relief will be granted where there is mere *mistake of law, quære.*” At all events, the whole course of the case, to our apprehension,

¹ Champlin v. Laytin, 1 Edw. Ch. 467.

² 6 Paige, 189.

³ 18 Wend. 407.

shows a very decided falling off from the high and imperative language, which the courts of New York held in some of the earlier cases.

In Pennsylvania there is a case, where a party, having deposited in the bank a check which proved to be forged, afterwards, on being informed of the fact, said, "if the check is a forgery, it is no deposit."¹ Chief justice Shippen held this to be "the expression of an opinion of what he should be obliged to allow, rather than of what he was willing to allow, and being made under a mistake of his right, he was not bound by it," and he cited the case of *Penn v. lord Baltimore* as conclusive to the point.

The Maryland reports furnish a strong authority on the same side.² There certain land had been devised to Bowley, who well knew of the devise, but had never supposed he became entitled to the land till the happening of certain contingencies mentioned in the will, whereas, in fact, the legal effect of the will was, to give him the land absolutely. A part of this land had been sold to Lammott, with the knowledge of Bowley. Many years afterwards, the true construction of the will having been ascertained, the defendant brought an action of ejectment for the land thus sold, and the plaintiff filed a bill for an injunction. The question to be decided, the court said, was simply whether a man who has a title to land, but who is ignorant of his right, forfeits his title by concealing his right, when he knows that another is about to purchase the land of a third person. They held that he did not; and they thought it clearly the true doctrine, and well supported by authorities, that a person acting under a plain and acknowledged mistake of his legal rights, should not thereby be deprived of those rights.

In Kentucky it is regarded as settled doctrine, that relief

¹ *Levy v. Bank of United States*, 1 Bin. 27.

² *Lammott v. Bowley*, 6 Har. & Johns. 500.

may be granted against mistakes of law. In *Fitzgerald v. Peck*¹ the defendant sold land, and took in payment three notes, one of which he passed directly to the plaintiff, to whom the two others were sold by a third person, and all for considerably less than the sum expressed in them. The defendant having failed to make out a title to the land, was obliged to pay the notes. A part of the amount he paid in cash, and he gave his note for the residue, as computed by the counsel of the parties, and covering the full sum stated in the notes. Judgment was recovered on this note, and the defendant asked for an injunction, which was perpetuated as to all beyond the sums actually paid by the plaintiff for the notes and costs of the suit. The ground on which the court put the defendant's right to relief, was that of mistake as to what he was really bound to pay.

In a very late case² the question as to the effect of mistakes of law was considered, at large, on general principles, and the conclusion at which the court arrived was, that if a man, without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, release a right, pay money, or undertake to do any act, he should be held entitled to relief equally as if he had acted under a mistake of fact, and for the same reason, namely, that the contract was not such as the parties, or one of them at least, really contemplated. "And such," they said, "we understand to be the rational and consistent doctrine of the common law established in Kentucky."

In South Carolina, where the question has been oftener discussed than in any other state except New York, the courts have twice acted upon, and in a third case deliberately affirmed the doctrine, that mistakes of law are a proper subject for relief. In the first case that came before them,³ the defendant had sold a wharf, and for a part of the purchase

¹ 4 Litt. 125.

² *Underwood v. Brockman*, 4 Dana, 309.

³ *Lowndes v. Chisolm*, 2 McCord, Ch. 455.

money had taken seven bonds, to secure the payment of which he held a mortgage of one half the wharf. Two of these bonds, on which the plaintiffs were sureties, the defendant assigned, together with so much of the mortgage as related to them, and the plaintiffs were obliged to pay the money due on them to the assignee. The defendant recovered judgment on the five other bonds, and the mortgaged premises were sold under the judgment, without any foreclosure of the mortgage, and were purchased by the defendant. Both he and his counsel meant to sell the fee simple of the property, and the sheriff so offered the premises for sale. In fact, only the equity of redemption passed by the sale. The plaintiffs filed their bill, claiming to have the proceeds of the mortgaged property applied to pay them in proper proportion, and insisting that the premises, in the defendant's hands, were liable to them as mortgage creditors; —thereby claiming to hold the defendant accountable for the sum he had bid for the property, under the supposition that he was buying the fee, yet allowing him only the equity of redemption. The court held the defendant not bound by the purchase, the effect of the sale being to pass a less interest than that which he believed he was purchasing. Here the question, as to the effect of a mistake of law, was directly before the court, and was the very point on which the case was decided. The court considered it "well established, that relief is given in cases where the mistake has been clearly one of law;" and they thought "the authorities relied on put the matter beyond all doubt, if indeed it could be doubted at this day."¹

The next case much resembled that of *Bingham v. Bingham*. The defendant had purchased land which was already his under a devise. But the heir at law interposed a claim, and the defendant was advised by counsel, that he could not

¹ *Lawrence v. Beaubien*, 2 Bail. 623.

hold the real estate, because, when the will was made, he was not a naturalized citizen. The defendant, desiring to become the owner of the land in question, procured the heir at law to execute a deed of assignment of all his interest in his father's real estate, in favor of the defendant, who, in consideration thereof, executed a bond, which was afterwards assigned to the plaintiff, and on which this action was brought. The case was very learnedly and elaborately argued on both sides. Mr. justice Johnson, in delivering the opinion of the court, said he had no hesitation in coming to the conclusion, that contracts founded on a plain and palpable mistake of the law, from a known state of facts, and capable of proof, ought not to be enforced; and he thought there was no difference in principle between the cases of recovering back money, and of enforcing a contract founded on a mistake of law. The mistake here was the precise point on which the case turned; and the verdict having been against the defendant, a new trial was granted.

In a subsequent case¹ the chancellor, in the court below, had thrown out some remarks calculated to shake the doctrine of the two earlier cases. When this case came before the court of appeals, the decree was affirmed, but the court thought it fitting to use the opportunity to express their decided adherence to the doctrine in question. Mr. justice Johnson, who delivered the opinion of the court, observed that *Lawrence v. Beaubien* was decided on much consideration, and the more he had reflected on it since, the more he was confirmed in its correctness.

We have now noticed all the authorities we have met with, having any material bearing upon the subject, on the one side and on the other. That all the cases can be reconciled with each other, may not be pretended. There is much strong language used by distinguished judges, on both sides.

¹ *Hopkins v. Mazyck*, 1 Hill, Ch. 242.

In such a case, regarding the question on the ground of authority simply, we can only inquire, which, from the circumstances under which it was used, is entitled to the greatest weight. We think it will be found, that in most, if not all of the cases, when we meet with the strongest language against granting relief, there was no sufficient evidence of any mistake having occurred; or else there were other controlling circumstances, going of themselves to settle the case, so that even if those same courts had held mistakes of law to be remediable under proper circumstances, and if the pretended mistake had been distinctly proved in these cases, they would have decided them precisely as they actually did decide them. Now, where a judge has made up his mind that the decision should be a certain way, let there have been a mistake or not, the question of mistake becoming thus little more than a speculative one, he might very possibly, in respect to it, express himself in language which he would find it exceedingly hard to stand by, in a case where the party seeking relief had justice on his side throughout, and the mind of the judge was subjected to the pressure of the single, naked question, whether a mistake of law, undeniably shown, should be allowed to divest one man of his indisputable property and rights, and to establish or confirm in another the possession of property to which he as clearly has no honest right. In regard to the decisions on the other side, some of them were put expressly upon the ground of mistake, and many of the others, if we correctly apprehend them, were actually decided upon that ground, and without such mistake the decision must have been the other way. On the whole, in view of all the cases on the subject, of the language used in them, and the circumstances under which it was used, we cannot but regard the actual preponderance of authority as unequivocally in favor of the doctrine, that mistakes of law may afford good cause for relief. C. M.

JURISPRUDENCE.

I.—DIGEST OF ENGLISH CASES.

COMMON LAW.

Selections from 9 Adolphus & Ellis, Part 1 ; 1 Perry & Davison, Part 4 ; 6 Neville & Manning, Part 5 ; 6 Scott, Part 5 ; 4 Meeson & Welsby, Part 5 ; and 5 Meeson & Welsby, Part 1.

ARBITRATION. (*Enlargement of time.*) An arbitrator who had power to enlarge the time for making his award by indorsement on the order of reference, made the following indorsement :—"I direct that a rule of this Court shall be applied for by counsel's hand, to enlarge the time of making my award." No such rule was applied for ; but the parties subsequently attended meetings before the arbitrator, and made no objection to the regularity of the enlargement : Held, first, that the indorsement was itself a sufficient enlargement of the time : but secondly, that if it were not, the irregularity had been waived. *Hallett v. Hallett*, 5 M. & W. 25.

2. (*Award, when sufficiently final—Proof of allegation of award made.*) Where an action of assumpsit, the declaration in which contained a count upon a promissory note for 22*l.* 11*s.* 9*d.*, and a count upon an account stated for 30*l.* was referred to arbitration, and the arbitrator found that the plaintiff had good cause of action for, and was and is legally entitled to have, claim, and recover of and from the defendant the sum of 22*l.* 11*s.* 9*d.*, being the amount of the promissory note mentioned in the pleadings in the said cause : Held, that the award was bad, inasmuch

as it did not dispose of the issue upon the account stated. (2 C. & M. 722.)

In an action upon the award, the declaration stated that the original action was referred by a rule of Court to A. B., who duly made his award of and concerning the premises so referred to him, and did thereby find, &c. The defendant pleaded that the said A. B. did not duly make and publish his award of and concerning the premises referred, in manner and form, &c. : Held, that the production of the award and the rule of Court was sufficient *prima facie* evidence to support the issue on the part of the plaintiff, until the validity of the award was impeached by evidence *dehors* on the part of the defendant. (11 East, 193.) *Gisborne v. Hart*, 5 M. & W. 50.

BILLS AND NOTES. (*Presentment of foreign bill payable after sight.*) A bill of exchange was drawn in duplicate on the 12th of August at Carbonear in Newfoundland, payable ninety days after sight, on S. & Co. in England, for the freight of a voyage from Liverpool to Carbonear. The bill was not presented for acceptance to S. & Co. until the 16th of November. Carbonear is twenty miles from St. John's, with daily communication between those places; and from St. John's there is a post-office packet three times a week to England, the average voyage being about eighteen days: Held, that the jury had properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the delay. *Straker v. Graham*, 4 M. & W. 704.

2. (*Consideration.*) To a declaration in debt on a promissory note for 24*l.*, dated 3d January, 1837, made by the defendant, payable twelve months after date to the plaintiff, the defendant pleaded that one J. W., before and at his death, was indebted to the plaintiff in 24*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, after the death of J. W., applied to the defendant for payment, whereupon, in compliance with his request, the defendant, after the death of J. W., for and in respect of the debt so remaining due to the plaintiff

as aforesaid, and for no other consideration whatever, made and delivered the note to the plaintiff, and that J. W. died intestate, and that at the time of the making and delivery of the note, no administration had been granted of his effects, nor was there any executor or executors of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid; and the defendant averred *that there never was any consideration for the said note except as aforesaid*: Held, that the plea was a good answer to the declaration. (1 C. & J. 231. See *Serle v. Waterworth*, 4 M. & W. 9.) *Nelson v. Serle*, 4 M. & W. 795.

3. (*Notice of dishonor, evidence of from subsequent admission—Pleading.*) On an issue joined in an action by indorsee against maker of a promissory note, on the fact of presentment, a promise made by the defendant to pay the bill, after it became due, is prima facie evidence to prove the issue. *Croxon v. Worthen*, 5 M. & W. 5.

CONSPIRACY. (*Indictment for, when too general.*) An indictment charged in the first count, that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit. The second count charged that two of the defendants, being in partnership in trade, and being indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments, to the great damage of the said creditors.

Held, 1, That the first count was not bad for omitting to state the names of the persons intended to be defrauded, as it could not be known who might fall into the snare; but that the count was bad for not showing by what means they were to be defrauded.

2, That the second count was bad for not alleging facts to

show in what manner the deed of sale was fraudulent. (2 Stra. 999; 1 East, 583; 2 B. & Ald. 204.) *Peck v. The Queen*, 1 P. & D. 508.

CONTRACT. (*Cannot be repudiated in part, on ground of fraud.*)

A. engaged to convey away certain rubbish for B. at a specified sum, under a fraudulent representation by B. as to the quantity of the rubbish which was to be so conveyed: Held, that in an action for the value of the work actually done, A. could recover only according to the terms of the special contract; although when he discovered the fraud, he might have repudiated the contract, and sued B. for deceit. (3 Camp. 351; 9 B. & C. 59; 1 Ad. & E. 40.) *Selway v. Fogg*, 5 M. & W. 83.

HUSBAND AND WIFE. (*Action by husband, when wife to be joined in.*) Lands were demised to A. & B. his wife for twenty-one years. A. afterwards granted a lease of them to C. for nine years: Held in an action brought by A. alone, for an injury to his reversionary interest, that the allegation that the reversion belonged to him was well supported, and that the wife need not be joined in the action; but that even if she ought, the objection should have been taken by plea in abatement. *Wallis v. Harrison*, 5 M. & W. 142.

INFANT. Assumpsit to recover the amount of a tailor's bill, for clothes supplied to the defendant's testator in his lifetime. Plea, infancy of the testator. Replication, necessities; on which issue was joined. On the trial it appeared that the testator was a minor at the time when the goods were supplied, but it was proved that he had an allowance of 500*l.* a year, besides his pay as a captain in the army. The learned judge at the trial was of opinion that if the minor had a sufficient income allowed him to supply him with necessities suitable to his condition for ready money, he could not contract even for necessities upon credit: Held, that this was a misdirection. *Burghart v. Hull*, 4 M. & W. 727.

LIMITATIONS, STATUTE OF. (*When it begins to run on contract of indemnity.*) A right to sue upon a contract of indemnity against the costs of an action is first vested when the

party to whom the indemnity is given pays the bill of costs, and not when it is delivered to him, and the Statute of Limitations therefore does not begin to run against his right of action until after such payment. (Overruling *Bullock v. Lloyd*, 2 C. & P. 119.) *Collinge v. Heywood*, 1 P. & D. 502.

MASTER AND SERVANT. A. agreed to enter into the service of B., and wrote to him a letter as follows: "I hereby agree to enter your service as weekly manager, commencing next Monday; and the amount of payment I am to receive I leave entirely to you." A. served B. in that capacity for six weeks: Held, (Parke, B. dissentiente) that the contract implied that A. was to be paid something at all events for the services performed; and that the jury in an action on a quantum meruit might ascertain what B., acting bona fide, would or ought to have awarded. (1 M. & Sel. 290.) *Bryant v. Flight*, 5 M. & W. 114.

PARTNERS. (*Liability of subscriber to joint stock company.*)

A project having been formed for the establishment of a company for the manufactory of sugar from beet-root, a prospectus was issued, stating the proposed capital to consist of 10,000 shares of 25*l.* each. The directors began their works, and entered into contracts respecting them, and manufactured and sold some sugar; but only a small portion of the proposed capital was raised, and only 1400 out of the 10,000 shares were taken: Held, that a subscriber, who had taken shares and paid a deposit on them, was not liable upon such contracts of the directors, without proof that he knew and assented to their proceeding on the smaller capital, or expressly authorized the making of the contract. (7 B. & Cr. 409; 9 B. & Cr. 632; 10 B. & Cr. 128.) *Pitchford v. Davies*, 5 M. & W. 2.

2. (*Actions between partners.*) Where A. and B. had been partners in certain transactions for the purchase and sale of wool, having also had other dealings together, and they settled a general account, in which was an item to B.'s debit "to loss on wool," and which showed a balance of 15*l.* against him; and B. signed the account and admitted the balance due: Held,

that A. might afterwards maintain an action to recover the amount of the item for the loss on the wool. Held, also, that it was no answer to such action, that, after the account was settled, the plaintiff had assented to a proposal of the defendant, that he should take out the balance in butcher's meat. *Wray v. Milestone*, 5 M. & W. 21.

POWER. (*Execution of by will.*) A power was to be executed by will, signed, sealed, and published, in the presence of and attested by witnesses. The will commenced, "I, L. H. S. &c. do publish and declare this to be my last will," and concluded, "I declare this to be my last will. In witness whereof I have to this my last will set my hand and seal," L. H. S. (L. S.) "Witness, A. B. and C."—Held, by Vaughan J., Parke B., Alderson B. and Coltman J.—(dissent. Tindal C. J., Bosanquet J., and Gurney B.)—that the publication of the will was not attested so as to satisfy the terms of the power. (Reversing the judgment of the Court of Queen's Bench, 6 N. & M. 259.) *Doe d. Spilsbury v. Burdett*, 1 P. & D. 670.

PRINCIPAL AND FACTOR. (*When property in goods vests in factor.*) T., a corn-merchant at Longford, who had been in the habit of consigning cargoes of corn to the plaintiffs, as his factors, for sale at Liverpool, and obtaining from them acceptances on the faith of such consignments, on the 31st of January obtained from the masters of two canal boats (No. 604 and No. 54), receipts signed by them for full cargoes of oats therein stated to be shipped on board the boats, deliverable to the agent of T. in Dublin, in care for and to be shipped to the plaintiffs at Liverpool. At that time boat 604 was loaded, but no oats were then actually shipped on board boat 54. On the 2d February, T. inclosed these receipts to the plaintiffs, and drew a bill on them against the value of the cargoes, which the plaintiffs accepted on the 7th, and paid when due. On the 6th of February, W., an agent of the defendant, who was T.'s factor for sale in London, arrived at Longford and pressed T. for security for previous advances. T. on that day gave W. an order on T.'s agent in Dublin, to deliver to W. the cargoes of boats 604 and 54 on

their arrival there. Boat 604 had then sailed from Longford, but boat 54 was only partially loaded. The loading was completed on the 9th, and T. then transmitted to W. in Dublin a receipt signed by the master of the boat, (in the same form as those sent to the plaintiffs), making the cargo deliverable to W. W. received this on the 10th. On their arrival in Dublin W. took possession of both cargoes for the defendant. Held, that the property in the cargo of boat 604 vested in the plaintiffs, on their acceptance of the bill, and that they were entitled to maintain trover for it; but that they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to the plaintiffs, when the receipt for that boat was given by the master, (1 Bos. & P. 563; 5 M. & Sel. 350; 2 Bing. 20; 37 R. 119, 783; 3 Price, 547; 3 M. & W. 15.) *Quare*, whether a document, similar in form to a bill of lading, but given by the master of a boat navigating an inland canal, has the effect of such an instrument in transferring the property in the goods. *Bryans v. Nix*, 4 M. & W. 775.

RELEASE. (*Cannot be avoided by parol.*) To a declaration against a defendant as maker of a promissory note, he pleaded that the note was a joint and several note by himself and A., and that A. had been released. Replication, that A. had been so released at the defendant's request, and that the defendant, in consideration of such release at his request, ratified the promise in the declaration, and promised that he would remain liable on the note, as if there had been no such release: Held, that the replication, setting up a parol contract to avoid the release, was bad. *Brooks v. Stuart*, 1 P. & D. 615.

STOPPAGE IN TRANSITU. The vendor by a delivery order directed the defendants, who were wharfingers, to deliver to the vendee "1028 bushels of oats, bin 40, to be weighed over, and the expense of weighing to be charged to the vendor." The vendee afterwards gave an order to the same effect on a sale to the plaintiffs. There were no other oats in the bin, and they were transferred to the plaintiffs in the defendants' books, but never weighed over. The vendor, on the failure of the first

vended, claimed a right of stoppage in transitu : Held, (without reference to any estoppel against the defendants, the wharfingers) that the property had passed as between buyer and seller, so as to defeat the vendor's right of stoppage. (2 Campb. 243 ; 1 N. R. 69.) *Swanwick v. Sotherton*, 1 P. & D. 648.

USURY. A. agreed with B. to lend him 200*l.* at the rate of 1*s.* in the pound per month (60*l.* per cent. per annum), to be secured as follows, viz : whenever any portion of the money should be advanced, the borrower was to give a promissory note payable one month after date, to be renewed as often as it should fall due ; and for each renewal, 1*s.* in the pound was to be paid by way of discount : Held, that the promissory notes so given were within the protection of 3 and 4 Will. IV. c. 98, s. 7, and 7 Will. IV. and 1 Vict. c. 80. (6 Ad. & Ell. 932 ; 5 Bing. N. C. 332.) *Holt v. Miers*, 5 M. & W. 168.

VENDOR AND PURCHASER. (*Of goods,—Specific appropriation by purchaser—Trover—Conversion.*) B., a builder, contracted with A. and others, trustees of a new hotel about to be erected by a company of proprietors, to build the hotel, except as to the ironmonger's, plumber's, and glazier's work, for a specified sum, and covenanted to complete certain portions of the work within certain specified periods, being paid by instalments at corresponding dates : and that if he should neglect to complete any portion within the time limited, he should forfeit and pay the sum of 250*l.* as liquidated damages. The agreement then contained a clause empowering the trustees, in case (inter alia) B. should become bankrupt, to take possession of the *work already done* by him, and to put an end to the agreement, which should be altogether null and void ; and that the trustees in such case should pay B. or his assignees only so much money as the architect of the company should adjudge to be the value of *the work actually done and fixed* by B., as compared with the whole work to be done. The course of business during the progress of the work was for the clerk of the works to inspect every article which came in under the contract, and none were received except on his approval. After the works

had proceeded some time, B. became bankrupt. Before his bankruptcy certain wooden sash-frames had been delivered by him on the premises of the company, approved by the clerk of the works, and returned to B. for the purpose of having iron pulleys belonging to the trustees affixed to them; and at the time of the bankruptcy, these frames, with the pulleys attached to them, were at B.'s shop. He afterwards, but before the issuing of the fiat, redelivered them to the trustees; and the sash-frames being afterwards demanded of them by B.'s assignees, they gave an unqualified refusal to deliver them up.

Held, 1st, that the property in the wooden sash-frames had not passed to the trustees at the time of the bankruptcy.

2dly, That they were not entitled to retain them under the agreement, as being *work already done*, they not having been *fixed* to the hotel; but that even if they were within that clause of the agreement, it could not bind the assignees, inasmuch as their right accrued on the bankruptcy, whereas the option of the trustees was not to be exercised until after the bankruptcy.

3dly, That the refusal of the trustees not having been limited to the *pulleys*, the demand and refusal were sufficient evidence of a conversion by them of the wooden sash-frames, so as to entitle B.'s assignees to recover them in trover. *Tripp v. Armitage*, 4 M. & W. 687.

WAGER. (*When void as against public policy.*) A wager as to the conviction or acquittal of a prisoner on trial on a criminal charge, is illegal, as being against public policy. *Evans v. Jones*, 5 M. & W. 77.

WORK AND LABOR. (*Assumpsit for, when right of action in, is complete.*) Where A. contracts to do work on materials supplied to him by B., (as where he contracts to survey a parish, and to set down the results of such survey in a map, upon paper furnished to him by B.), his right to sue for work and labor is complete as soon as he has finished the work, and has given B. a reasonable opportunity of ascertaining its correctness; and if (there being no contract for a specific price) he demand more for the work than a reasonable price, and refuse to deliver it

except upon payment of such larger price, that does not preclude him from suing for and recovering a reasonable price. *Hughes v. Lenny*, 5 M. & W. 183.

EQUITY.

Selections from 1 Beavan, Part 1; and 3 Younge & Collyer, Part 3.

ACCOUNT. (*Debt and damages.*) A court of equity will not take an account of debts one way and of damages the other, nor in any case where the subject as to which the account on one side is required would not be a matter of set-off at law, though it does not follow that where there would be a set-off at law, there would necessarily be an account in equity.

Accordingly where the plaintiff in the course of various dealings had given various bills of exchange in payment of goods supplied, and alleged by his bill that a large parcel of the goods furnished were by the fraud of the defendant very deficient in quantity and quality, the Court refused him to grant either an account or an injunction. *Glennie v. Imri*, Y. & C. 436.

AGREEMENT. (*Consideration—Husband and wife.*) An agreement by a wife to waive the further prosecution of an indictment against her husband for an assault, in consideration of a separate maintenance, though made with the sanction of the Court in which the prosecution was pending, is illegal in respect of the consideration, and is further open to the objection of being made between husband and wife. *Garth v. Earnshaw*, Y. & C. 484.

CHOOSE IN ACTION. (*Remedies of assignee in equity.*) The Court will not in ordinary cases assist the assignee of a bond in recovering what is due on such bond, but will leave him to bring his action at law in the name of the obligee. *Keys v. Williams*, Y. & C. 462.

DEBTOR AND CREDITOR. (*Collateral securities—Remedies in equity.*) Where a creditor upon a bond (of which he was

assignee) had also an equitable mortgage, and upon bill filed against his debtor had obtained an order for sale and for payment of his debt out of the proceeds of such sale, but such proceeds were not sufficient to pay him in full, the Court refused to order the balance to be paid him, but left him to his remedy at law upon the bond. *Keys v. Williams*, Y. & C. 462; (see S. C. 3 Y. & C. 55.)

EVIDENCE. (*Notes on brief.*) The notes made by a barrister on his brief on the trial of an action at common law, were admitted in a court of equity as evidence of what had been stated by a witness at the trial. *Cattell v. Corral*, Y. & C. 413.

FOREIGN PRINCE. (*Jurisdiction.*) Where a foreign prince brings an action in any of our common law courts, he becomes subject in respect of such action to the jurisdiction of our courts of equity as usually exercised in reference to proceedings at common law, and a bill of discovery will lie against such prince in aid of a defence to the action. *Rothschild v. Queen of Portugal*, Y. & C. 494.

PARTIES. (*Aliquot share of fund.*) Where a legacy of a sum of money was given to two in equal shares: Held, that either might file a bill for his share. (See *Hutchinson v. Townsend*, 2 Keen, 675.) *Hughson v. Cookson*, Y. & C. 578.

2. (*Husband and wife.*) The real husband of a woman, who had many years been separated from her, during which time she had married again, held a necessary party to a bill against her for the administration of the estate of her second supposed husband, whose executrix she was. S. C.

3. (*Supplemental suit.*) One of several co-plaintiffs mortgaged his interest, and became insolvent pending the suit; a supplemental bill was filed by the other plaintiffs against the mortgagee and provisional assignees alone: Held, that the defendants in the original suit, who were accounting parties, ought to have been made parties to the supplemental suit. *Feary v. Stephenson*, Bea. 42.

PLEA. (*Amended bill.*) Where a plea of want of parties had been submitted to, and the parties pointed out had been added,

a further plea for want of parties to the amended bill will not be allowed, unless the necessity for adding such parties arises from the amendments. *Rawlins v. Dalton*, Y. & C. 447.

PORTIONS. (*Ademption—Principles as to.*) The doctrine of ademption of portions, given by will, by subsequent advancement, does not apply to those cases where the original portion consists of an interest in real estate, and in all cases of ademption it is requisite that both portions should be similar in kind, definite in amount, and certain in enjoyment. *Davys v. Boucher*, Y. & C. 397.

PRODUCTION OF DOCUMENTS. (*On motion by defendant.*)

Where, in a suit for an account and an injunction, founded on an allegation of error and fraud in the accounts rendered by defendant, the plaintiff, by his bill, stated that a report had been made by an accountant, which, he said, the defendant ought to inspect and explain; it was ordered, on motion by the defendant before answers, that he should have one month's time to answer from the time of notice being given him that the said report had been left with the plaintiff's clerk in court for inspection; but an order for the defendant to inspect other documents relating to the accounts not denied to be in possession of the plaintiff, was refused. *Shepherd v Morris*, Bea. 175.

2. (*Privileged communication.*) In a suit to impeach the validity of a charge upon a living, on the ground that it had been taken in trust for the bishop of the diocese, upon whom the act of parliament under which the charge was made imposed a trust in regard to it, such suit being brought against the son of the bishop, to whom the charge had been transferred by his father: Ho'd, that a correspondence between the bishop, who was then deceased, and his solicitor, and a case submitted on his behalf to counsel, as to the validity of the charge, some years before the institution of the present suit, and also a correspondence in contemplation of the present suit between the defendant and the solicitor of the late bishop, who was not the solicitor of the defendant, were not privileged.

Distinction between the knowledge of the solicitor and the knowledge of the client. *Greenlaw v. King*, Bea. 137.

RECEIVER. (*Poundage.*) After a receiver had been appointed in an administration suit, money belonging to the estate was, with the consent of the parties owing it, who were insurance companies, ordered to be paid directly into court, without passing through the hands of the receiver, and to the exclusion of his right to poundage. *Haigh v. Grattan*, Bea. 201.

SEPARATE USE. (*Future coverture—Anticipation clause.*) A devise and bequest in trust for an unmarried woman, to her separate use, and so that she should not be able to alienate: Held, effectual upon any subsequent marriage, both as to the separate use and the restraint upon anticipation.

A proviso in restraint of alienation, though in general terms, following a gift to the separate use of an unmarried woman, was construed as intending to be confined to the period of any subsequent coverture, and was held to operate to that extent. *Tullett v. Armstrong*, Bea. 1. (An appeal against the decision is pending.)

2. (*Settlement by wife.*) By settlement made on the first marriage of a woman, property to which she was entitled in reversion was settled in trust for her to her separate use, exclusive of her then intended husband, or any other husband. Her first husband died, and she married again: Held, that the trust for her separate use still attached. *Dixon v. Dixon*, Bea. 40.

SALE UNDER DECREE. (*Delay of purchaser.*) Where the purchaser under a decree had been guilty of delay, a re-sale was ordered, unless he paid the money into court by a given day, and in the event of a re-sale, it was also ordered that he should make good the loss, if any, and pay the costs on all proceedings. *Gray v. Gray*, Bea. 199. See *Smith's Chan. Prac.* 205.

SPECIFIC PERFORMANCE. (*Compensation—Increase in value since contract.*) Where, after a protracted suit, specific performance was decreed, the conveyance to be dated at the time when a good title was first shown, an increase in the value of the estate, which had arisen from the dropping in of lives between that time and the time previous to it, when the vendor

had been ready to convey, was considered a subject of compensation, but the principle upon which the increase in value should be computed, which the Court observed to be a question of difficulty, was not settled at the hearing. *Townsend v. Champenowne*, Y. & C. 505.

2. (*Costs—Time of title shown—Date of conveyance.*) Where, by the Master's report, which was confirmed, it appeared that the plaintiff had a good title at the commencement of the suit, but that he did not show a good title till about two years before the Master's report: Held, that though a specific performance was decreed, the defendant was entitled to the general costs of the suit; but that he should pay the costs of discussing certain additional points referred to the Master, as to which he failed, and that, as to the costs in the Master's office generally, each party should pay his own, the defendant having taken many insufficient objections. The date of the conveyance was ordered to be on the day on which a good title was reported to be shown. S. C.

WILL. (*Construction—Books.*) The manuscript note-book of Dr. Willis, made during his attendance on George III., held to pass by his will under the general description of all his books in a particular residence where such note-book was found. *Willis v. Curtois*, Bea. 189.

2. (*Construction—General clause—Survivor.*) Where there were different bequests to different classes of children, followed by a general clause that the shares of all such legatees as died under twenty-three should go over to the survivor and survivors, such clause was construed distributively as to each class, and the word "survivor" was taken in its usual sense. *Cromeck v. Lumb*, Y. & C. 565.
3. (*Construction—Husband and wife.*) Where there was a bequest of 300*l.* to A. and his wife for their own use and benefit, followed by a direction that if A. should be indebted to the testator at the time of his death, the debt should be deducted from the legacy, and A. died in the lifetime of the testator, owing to him 250*l.* which remained unpaid at the testator's death: Held,

that the wife was entitled to the whole of the 300*l.* *Davies v. Elmes*, Bea. 131.

4. (*Construction—Locality of subject—Personal ornaments.*) A testator having three places of residence at A., B., and C., after having devised to his nephew his messuages at A., next bequeathed to him his house at B., which was leasehold, and the will then proceeded, “and I also give to my said nephew all my carriages, horses, implements, and my live and dead stock, and chattels in and about the said house and premises, and also my household goods and furniture, pictures, plate, linen, china, liquors of all sorts and brewing vessels, and likewise my watches and *personal ornaments* :” Held, that the household goods in each of the three residences passed by this bequest.

Quære whether a bust passed under the above words, and what is the meaning of “personal ornament.” *Willis v. Curtois*, Bea. 189.

5. (*Construction—Remoteness.*) A bequest of a residue to a class of children, some of them unborn at the death of the testator, followed by a clause that the shares should not be payable till the children attained twenty-three; and by another general clause that all legacies in the will should be vested in each of the legatees at twenty-three; and also that the shares and legacies of such as died under that age should go over to the survivor: Held void for remoteness. *Croneck v. Lumb*, Y. & C. 565.

BANKRUPTCY.

Selections from 1 Montagu & Chitty, Part 1; and 3 Deacon, Part 3.

AGENT. (*Common agent—Appropriation—Special case.*) Where a debtor and a creditor have employed the same agent, a remittance by the debtor to such agent, for the purpose of being paid over to the creditor, must be so applied by the agent or his assignee, even though the estate of the agent has a claim against

the remitting party ; and upon this principle, where a Belgian house had, through the agency of the bankrupts, consigned to a house in China goods for which the latter house remitted bills to the bankrupts, who were also their agents, which they directed to be appropriated, as well as the balance of a previous remittance, in payment of the Belgian house, to whom they also sent at the same time, through the bankrupts, a letter announcing the appropriation, the date of such letter and of the last remittance from China being subsequent to the date of the fiat : It was held by the lord chancellor, upon a special case, affirming the judgment of the court of review, that the bills, as also the balances on the previous account, must be handed over to the Belgian house. *Re Douglas*, Mont. & Ch. 1.

BANKRUPT TRUSTEE. (*Dividends.*) Bankrupt trustee not allowed to receive dividends on the trust fund, though the sum was only 200*l.* and the parties consented. *Exp. Strettell re Raikes*, Mont & Ch. 165.

PRINCIPAL AND SURETY. (*Interested assignee.*) Where the principal and surety had concurred in an equitable mortgage to the creditor of an estate, in which each of them had an interest, and both principal and surety afterwards became bankrupt, and the creditor was appointed assignee of the surety, and presented a petition for sale of the estate, such an order was refused, till a *quasi* assignee should be appointed to protect the interests of the surety and his creditors in the matter. *Exp. Haines, re Barnett*, Mont. & Ch. 32.

2. (*Proof by surety.*) Where a party accepted bills for the accommodation of the bankrupt, which the latter redeposited with his bankers as a security for the floating balance due to them from him, and the bankers proved for the whole of such balance, and the acceptor of the bills then paid such bills in full : Held, that he was not entitled to receive back from the bankers the dividends received by them in respect of the amount due on the bills, but was only entitled to stand in their place as to future dividends on that sum. (*Exp. Brunskill*, 4 Dea. & Ch. 442.) *Exp. Holmes, re Garner*, Dea. 662.

ECCLESIASTICAL COURTS.

Selections from 1 Curt. Part. 3.

ALIMONY. (*How forfeited.*) Where a wife who had been decreed alimony in a suit instituted by her against husband, had gone abroad for the purpose of evading compliance with a writ of *habeas corpus* issued against her by the King's Bench commanding her to produce her children, the Court held that this was no defence to a monition against her husband to compel payment of alimony. *Greenhill v. Greenhill*, 462. (Consist.)

PRESUMPTION OF DEATH. A person who had embarked in 1835, on his way from Manilla to London, in a vessel which had never since been heard of, nor any one on board, was presumed to be dead. *In the Goods of Hutton*, 595. (Prerog.)

2. (*Priority of death.*) A husband, his wife and child, having perished together by shipwreck, administration granted to the husband's effects as of a widower. *In the Goods of Murray*, 596. (Prerog.)

II.—DIGEST OF AMERICAN CASES.

Selections from 3 Shepley's (Maine) Reports; 20 Wendell's (New York) Reports; and 7 & 8 Dana's (Kentucky) Reports.

ACTION OF ASSUMPSIT. (*Mistake of law and fact.*) Where the parties contract under a mutual mistake of the facts supposed to exist, there being no fraud, and no beneficial interest obtained, the one who pays can recover back the money paid. *Norton v. Marden*, 3 Shepley, 45.

2. (*Same.*) But money paid under a mistake of the law cannot be reclaimed.

A mistake of a foreign law is regarded as a mistake of a fact. *Ib.*

3. (*Same.*) Nor can it be recovered back, when voluntarily paid, or paid with a knowledge, or means of knowledge in hand, of the facts. *Ib.*
 4. (*Same.*) Nor where there may have been a mistake of the facts, if the party paying has derived a substantial benefit from such payment. *Ib.*
 5. (*Sealed instrument.*) A sealed instrument may be used as evidence in an action of assumpsit, and may form the very foundation out of which the action arises, where in the sealed instrument there is no stipulation for payment or performance to the party to be benefited, or to some other person for his use. *Hinkley v. Fowler*, 3 Shepley, 285.
 6. (*When notes are taken on time.*) Where one sells property belonging to himself and others, and takes promissory notes therefor to himself alone, payable on time, and transfers the notes for his own benefit, an action will immediately lie against him, although the notes may not have become payable. *Ib.*
- AGENT. (*Liability of town agent.*) A town agent is not liable to the town for not resisting the payment of a claim, which the town had agreed to pay, even if the claim could have been successfully resisted. *Pittston v. Clark*, 3 Shepley, 460.
- ALIEN. (*Feme covert.*) A feme covert who is an alien may be naturalized; but her naturalization has not, under the general acts of congress, a retroactive operation, so as to entitle her to dower in lands of which her husband was seised during coverture, and which he had aliened previous to her naturalization. *Priest v. Cummings*, 20 Wend. 338.
- ASSAULT AND BATTERY. (*Plea of justification.*) To an action for an assault, battery, and wounding, defendants plead that they gently laid hands on the plaintiff to arrest him for felony, and did him no more injury than was necessary in effecting the arrest: the plea, as it does not justify the wounding, is insufficient; for, though a private citizen may arrest a felon, he may not wound him, unless resistance makes it necessary; and, in that case, a plea of justification must aver it. *Boles and another v. Pinkerton*, 7 Dana, 453.

ASSETS. (*Notes.*) Notes taken by an executor, upon a sale of property of the decedent, are not assets; and the mere fact that they were taken by one executor, who passed them over to another, does not make the former liable. *Young v. Wickliffe*, 7 Dana, 450.

ASSIGNMENT. (*Covenant to pay money.*) A covenant for the payment of money, in which there is also one for work and labor, is not assignable, so as to vest the assignee with the right to sue in his own name. *Marcum and another v. Hereford*, 8 Dana, 1.

ASSUMPSIT. (*Mutual mistake.*) Where a contract is made upon an assumed state of facts in reference to which there is a mutual mistake, money paid under such contract may be recovered back, *pro tanto*, in an action of assumpsit; and it was accordingly held in this case, where a contract was made for the sale and delivery of oats, and the parties, upon a mistaken state of facts, estimated the quantity at a certain number of bushels, for which the stipulated price was paid, that the purchaser was entitled to recover back money paid for the difference between the estimated and real quantity; and that, notwithstanding he had agreed to take the oats at the estimated quantity, hit or miss. *Wheadon v. Olds*, 20 Wend. 174.

2. (*Consideration.*) The inducement to sell a slave, or to reduce the price, being, in part, a promise made by the purchaser not to sell him so as to separate him from his family, or to sell him only to the vendor, or the like, is a good consideration to uphold the agreement. *Turner v. Johnson*, 7 Dana, 441.

BASTARDS. (*Statutes of Virginia and Kentucky respecting.*) The common law doctrine, that one born a bastard can never become legitimate, has been repealed, and the principles of the civil law adopted, by statutes of Virginia and Kentucky, by which it is provided, that antenuptial children shall be legitimated by the father's marriage to the mother, and recognition of the children; and that the issue of a marriage deemed null in law shall, nevertheless, be deemed legitimate. By these statutes, children so circumstanced, are legitimated as heirs and distribu-

tees of the father, and for every purpose. *Jackson's administrator v. Moore and Wife*, 8 Dana, 170.

BILLS OF EXCHANGE AND PROMISSORY NOTES. (*Draft payable at particular bank.*) A presentment of a draft, payable at a particular bank, to the cashier for payment at the bank, on the day it fell due, but after business hours, who refused payment because the acceptors had provided no funds, was held sufficient. *Flint v. Rogers*, 3 Shepley, 67.

2. (*Same.*) After due demand and refusal of payment, and after notice thereof has been put into the post-office directed to the indorser of a draft resident in another town, an action against such indorser, commenced on the same day, may be maintained, although by the regular course of the mail the notice would not reach him until the next day. *Ib.*
3. (*Declarations of payee.*) The declarations of the payee of a note, who is not at the time the holder, and while it is actually held by another for value, are not admissible in evidence in a suit upon it against the maker by an indorsee. *Russell v. Doyle*, 3 Shepley, 112.
4. (*Protest. Evidence.*) In an action upon a foreign bill, the protest is competent evidence to prove presentment of the bill to the acceptor and non-payment. *Green v. Jackson*, 3 Shepley, 136.
5. (*Sale of note at more than legal discount.*) The sale of a negotiable note, free from usury when made, and available as a good note before the sale, at a greater discount than legal interest, is not usurious, although indorsed by the party making the sale; and on non-payment by the maker, the indorsee may maintain an action against the indorser. *French v. Grindle*, 3 Shepley, 163.
6. (*Damages.*) The sum which the indorsee is entitled to recover from the indorser is the amount of the money paid for the note with interest. *Ib.*
7. (*Indorser not discharged by delay.*) Mere delay to enforce the collection of a note against the maker, does not discharge an indorser, once made liable, where the holder does not so bind

himself to give time to the maker, that an action against him on the note cannot be maintained. *Page v. Webster*, 3 Shepley, 249.

8. (*Law and fact.*) In an action against the indorser of a note, when the facts have been ascertained, whether legal notice has or has not been given, and whether due diligence has or has not been used, are questions of law to be decided by the court. *Thorn v. Rice*, 3 Shepley, 263.
9. (*Evidence of payee.*) The payee of a negotiable note, indorsed before it fell due, cannot be received as a competent witness to prove the note originally void. *Clapp v. Hanson*, 3 Shepley, 345.
10. (*Alteration.*) The holder of a bill has no right to make an alteration in it to correct a mistake, unless to make the instrument conform to what all parties to it agreed or intended it should have been. *Hervey v. Harvey*, 3 Shepley, 357.
11. (*Assignment.*) Where a negotiable note has been assigned, but not indorsed, proof by the maker, that there was no consideration, or that the note was fraudulently obtained by the payee, is admissible. *Calder v. Billington*, 3 Shepley, 398.
12. (*Guaranty.*) A guaranty of payment of a negotiable note, "for debt and costs without demand or notice," made by the indorser, renders him liable to the indorsee for the costs of a fruitless suit against the maker, but does not subject him to the payment of the expense of a protest. *Gilman v. Lewis*, 3 Shepley, 452.
13. (*What proved by protest.*) A bill of exchange drawn in one state of the union upon persons residing in another, is to be treated as a foreign bill, and a protest, apparently under the seal of a notary public, made in the state where the drawees reside, need only be produced, and proves itself as to the presentment and refusal; and so also, it seems, as to the transmission of notice to the parties on the bill, if such fact be stated in the protest. *Halliday v. McDougall*, 20 Wend. 81.
14. (*Checks.*) Checks are governed in several particulars by the same rules that prevail in relation to inland bills of exchange,

payable either on demand or at a given number of days after sight. *Smith v. Janes*, 20 Wend. 192.

15. (*When checks should be presented.*) Where the parties all reside in the same place, the check should be presented on the day it is received, or on the following day; and when payable at a different place from that in which it is negotiated, it should be forwarded by the mail on the same or the next succeeding day for presentment. *Ib.*

16. (*Second endorsee. Laches.*) Where a second endorsee of a check on receiving it put it in circulation, and not more than four or five days elapsed thereafter before it was sent for presentment, it was held, in an action by him against the payee, that he was not chargeable with laches; there being no evidence in the case but that he became the holder on the day it was negotiated by the payee. *Ib.*

CHANCERY. (*Decree of foreclosure.*) A decree of foreclosure of the equity of redemption, and a sale in pursuance thereof on a bill filed against the mortgagor alone, do not affect the rights of purchasers deriving title to the premises from and under the mortgagor, and who were not made parties to the bill in equity. *Watson v. Spence*, 20 Wend. 260.

2. (*Purchaser under void decree.*) A purchaser, under a void decree in possession of land, is viewed as a stranger, and cannot protect himself against the owner of the equity of redemption, by setting up an outstanding title in the mortgagee, at whose suit the decree was obtained. *Ib.*

CONSIDERATION. (*Release of a lien.*) The release of a lien obtained by the suing out of an attachment, is a good consideration for the promise of a third person to pay the debt of the party proceeded against by such process. *Smith v. Weed*, 20 Wend. 184.

2. (*Forbearance to sue.*) An agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt; but to render the promise obligatory, it must be in writing. *Watson v. Randall*, 20 Wend. 201.

CONSTITUTIONAL LAW. (*Private act of legislature.*) A

private act of the legislature authorizing the sale of the estate of infants, for their maintenance and education, is within the scope of the legitimate authority of a state legislature. *Cochran v. Van Surlay*, 20 Wend. 365.

CONTRACT. (*With two parties.*) Where one contracts in writing with three persons to give a bill of sale of two thirds of a vessel to two of them and of one third to the other, and in pursuance of the contract does convey two thirds; this is not a severance of the cause of action, and a suit may be maintained for the price against the whole. *Marshall v. Smith*, 3 Shepley, 17.

2. (*Failure of consideration.*) Where the consideration of a promissory note was an agreement to assign a contract made by a third person to carry the United States mail, on a certain route, and which had been assigned to the payee of the note by such third person, without the assent of the post office department; and where the post master general afterwards availed himself of his right to consider the contract as forfeited by such assignment, and made a new contract with a different person; it was held, that the consideration of the note had failed, and that the action upon it could not be maintained. *Savage v. Whittaker*, 3 Shepley, 24.

3. (*Variance between recital and instrument recited.*) When written instruments have reference to a former contract, and contain recitals of its subject matter, and it appears, that there is a variance between such instruments, and between them and the contract; the recitals are to be explained and corrected by the contract to which reference is made. *Sawyer v. Hammatt*, 3 Shepley, 40.

4. (*Agreement of married woman.*) An agreement by a married woman for the sale of her real estate, although made with the assent of her husband, and for a valuable consideration, is void in law, and will not be enforced in equity. *Lane v. McKeen*, 3 Shepley, 304.

5. (*Void for illegality.*) Where the charter of a bank provides, that, "no part of the capital stock shall be sold or transferred,

except by execution or distress, or by administrators or executors, until the whole amount thereof shall have been paid in," a contract to transfer shares therein, not falling within the exception, made and to be carried into execution when but fifty per cent. is paid in, is illegal and void. *Merrill v. Call*, 3 Shepley, 428.

6. (*Place of delivery.*) If a promise be made out of the United States by a foreigner to one living within this state, to deliver specific articles on a fixed day, and no place of delivery is assigned, it is the duty of such promisor to ascertain from the promisee the place where he will receive the articles. *White v. Perley*, 3 Shepley, 470.
7. (*Note payable in ready made clothing.*) On a note payable in ready made clothing, the payee has no right to demand a garment which has been made for a customer at a stipulated price. *Vance v. Bloomer*, 20 Wend. 196.
8. (*Same.*) The holder of a note of this kind, it seems, may demand payment of it in parcels, and is not bound to take clothing to its full amount at one time. *Ib.*
9. (*Sunday.*) When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and compliance with the stipulations of the contract on the next day (Monday) is deemed in law a performance. *Salter v. Burt*, 20 Wend. 205.
10. (*By letter.*) A party wished to buy a tract of land, and, not being favorably known to the owner, who resided in Indiana, got his neighbor, a friend of the owner, to write to him, proposing the purchase, as for himself. An answer was received in due time, consenting to the sale, and stating the price and terms: to which a reply, accepting the offer as made, was written and mailed, in a reasonable time: as the subject of the contract was sufficiently identified by the letters, as soon as the last, acceding to the terms offered, was put into the post office, there was a valid contract closed between the parties. *Chiles v. Nelson*, 7 Dana, 281.
11. (*Meaning of gold and silver.*) A note for so many dollars

"in gold and silver" is a note for the direct payment of money; and for the satisfaction of which, bullion, gold and silver bars, old spoons and rings, &c., would not be a valid tender. *Hart, &c. v. Flynn's Executor*, 8 Dana, 190.

CONVEYANCE. (*What interest passes by deed.*) A deed of the land conveys any interest the grantor has therein by virtue of an actual possession thereof for more than six years, although another has the better title. *Holbrook v. Holbrook*, 3 Shepley, 9.

2. (*Meaning of "privileges and appurtenances."*) By the conveyance of a sawmill and the privileges and appurtenances thereunto belonging, the land whereon the mill stands, as well as so much as is necessary to the use of it, passes with the mill. *Maddox v. Goddard*, 3 Shepley, 218.

3. (*Warranty.*) Where land has been conveyed with warranty, a title afterwards acquired by the grantor enures to the benefit of his grantee, or the heirs of the grantee, if he has died intestate. And if the grantee has devised the land and died, the title afterwards acquired by the grantor will, it seems, (*sed quere*), enure to the benefit of the devisees, according to their respective interests. *Logan v. Moore*, 7 Dana, 76.

CORPORATION. (*Refusing transfer of stock.*) An action of assumpsit lies against a monied corporation, for refusing to permit a transfer of its stock upon the books of the corporation, when by the act of incorporation such transfer is necessary to give validity to the transaction; case would lie, but assumpsit may be maintained. *Kortright v. Buffalo Com. Bank*, 20 Wend. 91.

2. (*Suits in another state maintainable by.*) The comity of modern times concedes to the subjects and citizens of one nation or state, the right to maintain suits in the courts and tribunals of another; and, in this respect, there is, in general, no difference recognized between artificial persons or corporations, and natural persons. *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 115.

COSTS. (*Bond with several breaches.*) In an action on a bond, other than for the payment of money, where the plaintiff assigns

several breaches, the defendant is not entitled to costs, although the plaintiff fail in establishing several of the breaches assigned by him, if the plaintiff succeed upon any one breach; the defendant is not entitled to costs unless the plaintiff fail upon all the breaches. *Fairbanks v. Camp and others*, 20 Wend. 600.

COVENANT. (*To pay debts.*) A covenant to pay all the joint debts of the parties, does not bind the covenantor to pay any of them before they are due, nor until a reasonable time after. A declaration, on such a covenant, that does not aver that any of the debts had become due, is defective. *McNeal's Administrator v. Blackburn*, 7 Dana, 172.

2. (*Breach of, waived by acceptance.*) A covenant to deliver goods or chattels of a particular description or quality, at a future day, is discharged by the delivery of any description or quality which the covenantee accepts, after having inspected them, or having had a fair opportunity to do so; and he can maintain no action afterwards, on account of defects of quality. And herein contracts of this description differ from contracts of warranty upon executed sales. *O'Bannon & Co. v. Relf, &c.* 7 Dana, 320.

DAMAGES. (*In contract for sale of land.*) When a contract is made to purchase and pay for land by one party, and to sell and convey by the other on payment of the price, and an action is brought against the purchaser for breach of the contract on his part, without tendering a deed, the measure of damage is the difference between the sum, which the purchaser agreed to pay for the land, and the sum for which it would have sold on the day on which the contract should have been performed. *Robinson v. Heard*, 3 Shepley, 296.

2. (*In action on the case for negligence.*) In an action on the case for negligence in driving a carriage, whereby the son of the plaintiff was run over and killed: it was held, that the loss of service of the child, and expense occasioned by the sickness of the plaintiff's wife, caused by the shock to her maternal feelings, were proper items of damage: the same being laid as special damage in the declaration. *Ford v. Monroe*, 20 Wend. 210.

3. (*Measure of, for failure to convey.*) The measure of damages for a failure to convey, is the consideration with interest—not in all cases from the date of the covenant, but—from the time when the money was payable without interest, or begun to bear interest; and if the covenant does not show that, it may be shown by proof *aliunde*. *Herndon v. Venable*, 7 Dana, 372.

DEED. (*Lands bounding on river.*) Where in a conveyance of premises situate on the bank of a river not navigable, the lines are stated to run from one of the corners of the lot to the river, and thence along the shore of said river to a certain street, the grantee takes *ad filum aquæ*. Mr. Justice Bronson dissented. *Starr v. Child*, 20 Wend. 149.

2. (*Approval of master.*) Where an order of sale made by the chancellor authorized a trustee to sell, or to mortgage, or to convey the premises in satisfaction of any debt owing by him, requiring, however, that every sale, and mortgage, and conveyance in satisfaction, should be approved by a master, by a certificate endorsed on the deed; and a sale for cash took place, and a deed was executed without the approval of the master obtained, it was held, by a majority of the court, that the approval of a master was necessary only in the third alternative, specified above, and that consequently the deed executed on a sale for cash was valid, notwithstanding the want of such approval. *Cochran v. Van Surley*, 20 Wend. 365.

DEVISE. (*Of uncultivated lands.*) A devise of uncultivated lands, without words of inheritance, carries a fee in them. *Russell v. Elden*, 3 Shepley, 193.

2. (*Construction of.*) Where the testator gave and bequeathed to one grandson certain lands, and also a note of hand and different articles of personal property; and if that grandson should die under age and without issue, directed, “that the several legacies therein bequeathed” to that grandson “should be paid or given” to another grandson; it was held, that upon the death of the first grandson, under age and without issue, the second grandson should take the lands. *Ib.*

3. (*Same.*) Where there are no words of limitation or inheritance

in a devise of land, and the estate, with or without the personal property, is charged with the payment of debts, the devisee takes but an estate for life; but if the charge be upon the devisee, he takes an estate in fee. *McLellan v. Turner*, 3 Shepley, 436.

4. (*Estate for life.*) Under a clause in a will in these words, "I ordain that my beloved wife Lanah shall have the care of my farm as long as she remains my widow, for her support and maintenance, and (that) of my children and mother," was held to give her an interest in the land *durante viduitate*, notwithstanding a subsequent clause giving the same premises to the children in fee. *Beekman v. Hudson*, 20 Wend. 53.
5. (*Residuary devisees and heir at law.*) Property specifically does not go into the *residuum* where the devisee is by law incapable of taking; in such case, as well as where a devise lapses by the death of the devisee, the property descends to the heir at law: and it was accordingly held, where by a will made in 1722, real estate was devised to a religious corporation, and the will contained a devise to residuary devisees, that though the devise to the corporation was void *ab initio* for the purpose of passing the estate, still it was operative as indicating the intent of the testator, and that the devise to the corporation showing the intention of the testator not to give the property to the residuary devisees, it did not pass to them, but descended to the heir at law. *Van Kleeck and New York Dutch Church*, 20 Wend. 457.
6. (*Same. Void devise.*) Where there is an absolute devise to a corporation, which by law is incapable of taking, nothing can be claimed by reason of such devise by a residuary devisee on the ground of a contingent interest given by the residuary clause, based upon the possibility of a reversion of the estate by the dissolution of the corporation, or by a forfeiture of its rights, in consequence of the non-performance of conditions. *Ib.*
7. (*Vested legacy.*) Where, by the same will, the testator gave to each of his grandchildren who should be living at the time of his death, the sum of \$6000, to be paid upon their attaining the age of twenty-one, or marrying, such payment, however, to be

subject to the approbation of the parents of the grandchildren, and the time of payment to be fixed by them ; it was held, that the legacies were vested and not contingent, and that the power given to the parents did not prevent the vesting of the legacies.

Hone's ex'rs v. Van Shaick, 20 Wend. 564.

DOWER. (*Increased value.*) The widow, on the assignment of her dower, is to be excluded from the increased value arising from labor and money expended upon the land after the alienation, but not from that which has arisen from other causes. *Mosher v. Mosher*, 3 Shepley, 160.

2. (*On land improved since conveyance.*) A widow, claiming dower in land which her husband sold, and upon which improvements have been made since his alienation, is entitled, not to a third in value of the land as augmented by those new improvements, but, to a third in value without including them in the estimate. *Wall, &c. v. Hill*, 7 Dana, 175.

EQUITY. (*Misrepresentation of fact.*) When one party makes a misrepresentation of fact, upon the faith of which the other acts, it is immaterial, in a court of equity, whether he knew of its falsehood, or made the assertion without knowing whether it were true or false ; and a conveyance of land obtained by such false representation is void. *Harding v. Randall*, 3 Shepley, 332.

EVIDENCE. (*Judgment.*) In an action upon a written promise, to indemnify the plaintiff against all claim upon him by one to whom he had previously given a bond to convey the same land which was conveyed by the plaintiff to the promisor at the time the promise was made ; a judgment against the plaintiff in a suit on the bond, in which the present defendant appeared as the attorney of the then defendant and present plaintiff, and after having knowledge of the cause of action, had suffered a default to be entered, is legal evidence of the right to recover on the bond in the present action. *Holbrook v. Holbrook*, 3 Shepley, 9.

2. (*Same.*) In an action against a town for damages sustained in the loss of a horse, alleged to have been caused by a defect in the highway, and where the defence was, that the injury was

occasioned by driving rapidly an unbroken and unmanageable horse in the night, and not by the badness of the road ; it was held, that evidence of the previous bad behavior of the horse was admissible. *Dennett v. Wellington*, 3 Shepley, 27.

3. (*Husband and wife.*) Improper or irrelative testimony cannot become admissible merely because it is introduced by the cross-examination of a witness called by the adverse party. *Norton v. Valentine*, 3 Shepley, 36.
4. (*Printed volume of laws.*) A printed volume of the laws of a British province, proved by witnesses to have received the sanction of the executive and judicial officers of the province, as containing its laws, is admissible in evidence in a case where the title to land, situated within that province, is in question. *Owen v. Boyle*, 3 Shepley, 147.
5. (*Witness.*) Where one party calls a witness, a paper admitted by the witness to be true, although not then under oath, contradictory to his testimony, is competent evidence for the other party. *Robinson v. Heard*, 3 Shepley, 296.
6. (*Burden of proof. Declarations of defendant.*) Where the plaintiff in proving a conversion of his property by the defendant, at the same time proves that the defendant said, that he acted under lawful authority, the burden of proof is on the defendant to show such authority. *Brackett v. Hayden*, 3 Shepley, 347.
7. (*Of loss of writ.*) Testimony by the attorney who made a writ, that he had made diligent search and inquiry therefor and could not find it, and that he last saw it in the hands of the officer, is not sufficient proof of the loss of the writ to admit parol evidence of its contents. *Phillips v. Purrington*, 3 Shepley, 425.
8. (*Witness. Partnership.*) A person employed as an agent in the conducting of a particular business, at a fixed salary, who by the terms of the agreement with his employers, was to receive in addition thereto one third of the profits of the concern, but not to be liable for any losses, was held not to be a partner, and therefore a competent witness in an action brought by his employers. *Vanderburgh v. Hull*, 20 Wend. 70.

9. (*Account books.*) The account books of a manufacturer, properly authenticated, are admissible in evidence, in an action by him against his customer, although entries were originally made by a foreman in the factory, if such entries were made only for a temporary purpose on a slate, and were from time to time transcribed by the principal into his day-book. *Sickles v. Mather*, 20 Wend. 72.
10. (*Competency of released guarantor.*) Where a party who had transferred a note and guaranteed its payment, obtained another person to assume his place as guarantor, and was thereupon released by the holder of the note, it was held, on objection made, that by the release he became a competent witness in an action for the recovery of the note; that the objection went to his credibility, and not to his competency. *Mott v. Small*, 20 Wend. 212.

EXECUTORS AND ADMINISTRATORS. (*Executor de son tort.*) If one receive a fraudulent bill of sale of personal property from an intestate in his life time, and take and sell it after his decease, such fraudulent purchaser is chargeable to a prior creditor, as executor *de son tort*. *Allen v. Kimball*, 3 Shepley, 116.

2. (*Interest.*) An executor lent out some of the funds of the estate at more than six per cent. and made use of some in trade, and for the latter he charged himself, in his (unsettled) account, with interest at ten per cent.—the payment of the balance found against him, after his death, devolving upon his sureties, it is decided that they shall be held accountable for the extra interest actually received by the executor; but with six per cent. only, on the money he used himself. *Clay and Craig v. Hart*, 7 Dana, 17.

3. (*Same.*) Interest is to be charged against administrators, on items disallowed in accounts surcharged. *Amos's Administrators v. Heatherby*, 7 Dana, 48.

FRAUDS. (*Goods bought in several parcels.*) Where goods, amounting in the aggregate to upwards of \$100, are purchased at auction, in several parcels, upon distinct and separate bids, to be paid for in a note at a future day, the whole constitutes

but one contract, and the delivery of some of the parcels is sufficient to take the case, as to the residue, out of the operation of the statute of frauds. *Mills v. Hunt*, 20 Wend. 431.

2. (*Fraudulent conveyance.*) A decree in chancery, adjudging an absolute sale of personal property by a debtor to his creditor fraudulent and void under the statute as against creditors, on appeal was affirmed in the court for the correction of errors; the property transferred being deemed to be of a value more than sufficient to satisfy the debt of the vendee; the transfer having been made during the pendency of a suit by other creditors, and the vendor having continued in possession, disposing of the property as the agent of the vendee, and receiving a compensation for his services as such agent. Senators Dickinson and Verplanck dissented. *Stoddard and others, appellants, and Butler, respondent*, 20 Wend. 507.

FRAUDS, STATUTE OF. (*Agreement to convey lands.*) An agreement for the conveyance of land, not reduced to writing, although performed in part by each party, cannot be enforced by an action at law for the recovery of damages. *Norton v. Preston*, 3 Shepley, 14.

2. (*Same.*) Where a contract for the sale of land, which when made was within the statute of frauds and might have been avoided thereby, has been fully executed, and nothing remains but to pay over the money received, the statute furnishes no defence. *Linscott v. McIntire*, 3 Shepley, 201.

HIGHWAY. (*Rights of public in soil adjoining navigable waters.*) The public has not the right to use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit of property in its transit, against the will of the owner, although such user has been continued for more than twenty years. The user cannot be urged by the public, either as the foundation of a legal presumption of a grant and thus justify a claim by prescription, or as evidence of dedication of the premises to public use. *Pearsall v. Post*, 20 Wend. 111.

HUSBAND AND WIFE. (*Separate estate of wife.*) The

separate estate of a *feme covert*, in the hands of trustees, is in equity chargeable with debts contracted for the benefit of the estate. So such estate is chargeable where a portion of it has been converted into other property in conformity to the provisions of the trust deed, and a debt is contracted for the benefit of such substituted property. *Dyett v. N. A. Coal Co.* 20 Wend. 570.

INDICTMENT. (*Conspiracy.*) A conspiracy to commit a misdemeanor is not merged in the commission of it. *State v. Murray*, 3 Shepley, 100.

INFANCY. (*Trover.*) Infancy is no bar to an action of trover, where the goods converted by the minor came into his hands under a prior illegal contract. *Lewis v. Littlefield*, 3 Shepley, 233.

INSURANCE. (*Sea-worthiness.*) In the insurance of a vessel, on time, the warranty of sea-worthiness is complied with, if the vessel be in an unexceptionable condition at the commencement of the risk; and the fact that she subsequently sustained damage, and was not properly re-fitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission. *American Ins. Co. v. Ogden*, 20 Wend. 287.

2. (*Same.*) A defect of sea-worthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the owner or his agents, discharges the underwriter from liability for any loss, the consequence of such want of faith, prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy, and not caused or increased by such particular defect. *Ib.*
3. (*Total loss. Abandonment.*) The insurer is not liable either in the case of a technical total loss or actual loss, where it appears that the necessity, the *prima facie* ground of abandonment, though real, was yet the result of culpable negligence, or want of due diligence on the part of the owner or his agents. *Ib.*

4. (*Same.*) Under ordinary circumstances, a vessel cannot be abandoned as for a constructive or technical total loss, on the ground of the inability of the master to obtain funds to make necessary repairs, where the owner is chargeable with want of ordinary prudence in furnishing funds or credit, and especially where he has deprived the master of the means ordinarily possessed by him to obtain funds or credit. *Ib.*
5. (*Total loss. Cost of repairs.*) In determining the right to abandon as for a technical total loss in reference to the cost of repairs, the parties, it seems, are concluded by the sum inserted in the policy as the value of the vessel, and are not allowed to give proof of its real value. *Ib.*

LANDLORD AND TENANT. (*Covenant to renew.*) A covenant to renew a lease, under the same covenants contained in the original lease, is satisfied by a renewal of the lease omitting the covenant to renew. *Carr v. Ellison*, 20 Wend. 178.

LIEN. (*Tender.*) A tender of the charges must be made before suit, where a lien exists, unless the goods have been parted with; in which latter case all that can be claimed by the defendant is a mitigation of damages by way of recoupment. *Saltus v. Everett*, 20 Wend. 267.

LIMITATIONS. (*Declarations by executor or administrator.*) Declarations or acknowledgments from which a new promise might be inferred, if made by the debtor himself, will not be sufficient for that purpose when made by the executor or administrator. If the executor or administrator can charge the estate by any promise made by him to pay a demand barred by the statute of limitations, it must be an express promise or agreement to pay, and not a mere acknowledgment of the existence of the debt. *Oakes v. Mitchell*, 3 Shepley, 360.

MORTGAGE. (*Of personal property.*) The mortgagee of personal property, where there is no agreement that the mortgagor shall retain the possession, may maintain replevin therefor, before the expiration of the time of credit; although the mortgagor had been suffered to retain the possession, and had sold

the property to a third person. *Pickard v. Low*, 3 Shepley, 48.

NUISANCE. (*Public and private.*) Public nuisances are of two classes, namely, physical, tangible objects ; for example, a house or fence in a public highway ; and those which, being merely moral, are intangible, for example, the assembling and misconduct of persons at a disorderly house, the keeping of a tipling house, &c. It is the former that private persons may abate upon their own authority. The latter can only be suppressed by legal proceedings. *Gray v. Ayres and another*, 7 Dana, 375.

OBLIGATIONS. (*Consideration.*) The inducement to a surety to sign the principal's note (after it had become due) was an agreement, made with him, and indorsed on the note, to extend the time of payment : held, that this agreement was a valuable and sufficient consideration to uphold the obligation on his part, and defeat his plea of want of consideration. *Pulliam and Payne v. Withers*, 8 Dana, 100.

OFFICER. (*Measure of damages.*) Where an officer has made a false return, he is responsible for the ordinary results of his own acts ; but not for the illegal or oppressive conduct of the creditor, or another officer. The injury and loss which the plaintiff actually sustained by the false return are the only proper subjects of examination in estimating the damages. *Norton v. Valentine*, 3 Shepley, 36.

2. (*Cannot settle action.*) An officer, having in his hands a writ for service, has no authority in his official capacity to settle the demand, and to receive the money of the debtor. *Waite v. Delesdernier*, 3 Shepley, 144.

PARTNERSHIP. (*Admission by pleading general issue.*) Where an action is brought by two, alleging themselves to be copartners under a particular name, pleading the general issue does not admit that the plaintiffs were the persons composing that partnership when the contract declared on was made ; although it is an admission of the existence of some copartnership of that name. *Norcross v. Clark*, 3 Shepley, 80.

2. (*Admissions by one partner.*) Where the partnership is first

established by other proof, the admissions of one partner may be received to charge the partnership in relation to transactions during its existence. *Phillips v. Purington*, 3 Shepley, 425.

3. (*General reputation.*) General reputation of a partnership, existing between two or more individuals, standing alone and not offered in corroboration of facts and circumstances, is inadmissible in evidence to prove a partnership. Whether it be admissible, even as auxiliary evidence, *quere?* *Halliday v. McDougall*, 20 Wend. 81.
4. (*Scaled instrument.*) Although one partner cannot bind his copartner by seal, where the effect of the instrument thus executed is to charge the firm, yet it is competent to him, by an instrument under seal, to authorize a third person to discharge a debt due to the firm. *Wells v. Evans*, 20 Wend. 251.
5. (*Interest.*) Where, upon the dissolution of a partnership, there is a balance due to one of the firm from the other, which he fails or refuses to pay over; or where one had put in more capital than the other, which, upon the dissolution, and the debts being paid, he has an immediate right to withdraw, but the other retains it, the partner who is thus indebted is liable for interest from the time of the dissolution till he pays over the money. *Honore v. Colmesnil*, 7 Dana, 201.
6. (*Costs.*) A partner, whose unjust conduct has made it necessary for his co-partners to resort to a suit in chancery to obtain a fair settlement, is liable to them for their costs, including what they have been taxed with as their share of compensation allowed to the auditor for investigating and adjusting the accounts. *Moon and Taylor v. Story*, 8 Dana, 233.
7. (*Property of individual partner.*) An execution against one of several partners may be levied upon his interest in the partnership property; and, if the property consists of divers articles, the debtor's interest in the whole should not be sold in gross, but the articles should be taken separately, and his undivided interest in each one should be sold by itself, unless the peculiar character of the articles would make it improper to separate them: the sale should be conducted just as it would be, if the debtor was

sole owner of the property levied on. *Aldrich v. Wallace, &c.* 8 Dana, 287.

PLEADING. (*Material fact omitted in declaration.*) Where a material fact is omitted in a declaration, the defect is cured by a verdict, if the pleadings directly put in issue the fact omitted. *Elliot v. Stuart*, 3 Shepley, 160.

PRINCIPAL AND AGENT. (*Sale by factor.*) A contract of sale by a factor or agent, entrusted with goods for the purpose of sale, is valid, and will protect a purchaser against the principal, although no money is advanced, or negotiable instrument or other obligation given at the time of the contract; it is enough if an obligation be subsequently entered into on the faith of the contract, at any time whilst it remains unrescinded: it was accordingly held in this case, that the subsequent endorsements of promissory notes, and in anticipation of which the property was transferred, gave effect to the contract. *Jennings v. Merrill*, 20 Wend. 9.

2. (*Release in attorney's own name.*) A release executed by an attorney in his own name, and not in the name of his principal by himself as attorney, is not obligatory upon the principal; and parol proof is inadmissible to show an adoption of the act, by the principal receiving the consideration of the release. *Wells v. Evans*, 20 Wend. 251.

PRINCIPAL AND SURETY. (*Contribution from co-sureties.*) One of several sureties may maintain a bill against his co-sureties and the principal, before the debt is paid, for indemnity from the latter, if it may be obtained from him; if not, for contribution. *Morrison v. Poyntz*, 7 Dana, 307.

2. (*Insolvency.*) Where there are more than two sureties, and one of them is insolvent, equity distributes the burthen equally among those who are solvent. *Ib.*

REPLEVIN. (*How abated.*) It is good cause for the abatement of a writ of replevin, that at the time of the taking by the defendant, the chattels were the joint property of the plaintiff, and of another person. *McArthur v. Lane*, 3 Shepley, 245.

2. (*Immediate possession.*) The action of replevin cannot be

maintained, unless the plaintiff have the right to immediate possession of the property. *Ingraham v. Martin*, 3 Shepley, 373.

3. (*Same.*) Thus where there is an agreement in a mortgage of personal chattels, that the mortgagor shall retain the possession for a stipulated time, the mortgagee cannot maintain replevin therefor until the time has expired. *Ib.*

SALE OF CHATTELS. (*Liability of auctioneer.*) An auctioneer who sells stolen goods is liable to the owner in an action of trover, notwithstanding that the goods were sold, and the proceeds paid over to the thief without notice of the felony. *Hoffman v. Carow*, 20 Wend. 21.

2. (*Market overt.*) The exception of sales in *market overt* which prevails in England, is not recognized here. *Ib.*
3. (*Statute of frauds.*) Where a contract is made for the sale of an article of merchandize at a stipulated price, although the contract be void under the statute of frauds, the price agreed upon may be recovered, if the article be subsequently delivered and accepted. *Sprague v. Blake*, 20 Wend. 61.
4. (*Goods of "merchantable quality." Acceptance.*) Although by the terms of a contract an article agreed to be delivered is to be of a merchantable quality, still if an inferior article be delivered and accepted, the purchaser when called upon for payment is not entitled to a reduction from the contract price, on the ground of the inferior quality of the article; he must refuse to accept it, or if its inferiority be subsequently discovered, he must return it, or require the purchaser to take it back. *Ib.*
5. (*False representation.*) Where goods are obtained by a purchaser by false representations as to his ability to pay, and by suppressing the truth, the vendor may rescind the sale, and after demand and refusal bring an action of trover against a sheriff who has levied upon the goods by virtue of an execution against the purchaser. *Hitchcock v. Covill*, 20 Wend. 167.
6. (*Possession and property.*) The doctrine that possession carries with it the evidence of property, so as to protect a person acquiring property in the usual course of trade, is limited to cash, bank bills, and bills payable to bearer. *Saltus v. Everett*, 20 Wend. 267.

SHIPPING. (*Construction of bill of sale of.*) A bill of sale of the hull of a vessel with all and singular her tackle, apparel and furniture, does not include a chronometer on board at the time, where no agreement of the parties, or custom of merchants, in relation to it, is made to appear. *Richardson v. Clark*, 3 Shepley, 421.

SLANDER. (*Admission by justification.*) Where a publication treats of the manner in which a particular business is conducted by two individuals carrying on business under the name of a firm, and one of the members of the firm brings a suit alleging the publication to be a libel of and concerning him in his trade and business, and that its object is to impoverish and ruin him, a plea of justification is an admission that the plaintiff is one of the firm mentioned in the publication. *Fidler v. Delavan*, 20 Wend. 57.

2. (*Actionable words.*) In slander, a plaintiff may in the same count charge words not actionable *per se*, with words actionable in themselves, in aggravation of damages; and in such case the defendant is not at liberty to demur to some of the words and take issue upon the others. *Dioyt v. Tanner*, 20 Wend. 190.

TENANT IN COMMON. (*Of mill and mill privilege.*) One tenant in common of a saw-mill and mill privilege may maintain an action of trespass *quare clausum*, against a co-tenant for the destruction of the mill. *Maddox v. Goddard*, 3 Shepley, 218.

2. (*When previous demand necessary.*) Where an officer attaches goods, owned by the debtor and creditor as tenants in common, and sells them on the writ by consent, an action cannot be maintained by the creditor to recover against the officer the proceeds of the sale of his share of the goods without a previous demand. *Steele v. Putney*, 3 Shepley, 327.

TENDER. (*Must be unqualified.*) A tender of money in payment of a debt, to be available, must be without qualification, that is, there must not be any thing raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered; and it was accordingly held, in this case, that the tender of a sum of money in full discharge of all

demands of the creditor, was not good. *Wood v. Hitchcock*, 20 Wend. 47.

TRESPASS FOR MESNE PROFITS. (*Evidence in.*) In trespass for *mesne profits*, evidence to show that the defendant had made lasting and valuable improvements, is not admissible under a plea of not guilty. Nor is there any appropriate plea, that will admit such proof. If, in consequence of improvements made by the tenant, the profits have increased, the jury in making up the verdict, may premit the increase, and find what the rents would have amounted to without them. *Myers and another v. Sanders's heirs*, 8 Dana, 65.

TROVER. (*By landlord.*) Though a landlord cannot maintain trespass for cutting timber upon land in possession of his tenant, for a conversion of it after it is cut, he may maintain trover; for the tenant's interest in the timber ceases upon its severance from the freehold, and the right of property in the landlord draws after it a constructive possession. *Railroad Co. v. Kidd*, 7 Dana, 250.

VENDORS AND PURCHASERS. (*False representations.*) To render a sale void by reason of false representations, there must be proof not only that they were untrue, but that they were made by the vendor with the design to deceive, and that the other party was thereby deceived and injured; and such design must be proved by other evidence than the mere fact, that the representations were not true. *McDonald v. Trafion*, 3 Shepley, 225.

2. (*Stoppage in transitu.*) Where goods are sold, and delivered on board a ship of the vendee, and are stopped in their transit by the vendor, the vendee is entitled to receive payment of the freight and charges on the goods reclaimed, and has a lien upon them therefor. *Newhall v. Vargus*, 3 Shepley, 314.

3. (*Stoppage in transitu.*) Where goods are stopped in their transit by the vendor, the vendee cannot recover back a partial payment made therefor. *Ib.*

4. (*Same. Lien.*) This lien on the goods stopped is not divested, because the possession of them has been obtained by process of law. *Ib.*

5. (*Bill overdrawn.*) If the vendor of goods sold draw a bill for the amount on the vendee, and by mistake extend the time of payment therein beyond the time agreed by the parties, and the vendee fraudulently seize upon the mistake, and accept the bill, to entrap the other party for his own advantage and to the other's injury; the vendor may treat the bill as void, and maintain an action for the goods sold. *Hervey v. Harvey*, 3 Shepley, 357.
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III.—MISCELLANEOUS CASES.

In the District Court of the United States, for the district of Maine, March 20, 1840.

THE HULL OF A NEW BRIG.

By the general maritime law, material men, who perform labor or furnish materials for building or repairing a vessel, have in addition to the liability of the owner, a lien on the vessel for their security; but this principle of the maritime law has never been adopted by the common law.

By the maritime law of the United States, material men have a lien on the vessel for supplies furnished a foreign vessel, but not for supplies for a domestic vessel; and for the purposes of the lien every vessel is considered foreign when in a port of a state to which she does not belong.

The statute of Maine, of February 19, 1836, ch. 626, giving to "all ship-carpenters, caulkers, blacksmiths and joiners, and other persons who perform labor, or furnish materials for or on account of any vessel building or standing on the stocks by virtue of a written or parol agreement," a lien on the vessel, does not include the case of a laborer, hired generally, and employed in various work, so as to give him a lien on the vessel for his wages for such part of the time as he may have been employed in work for the vessel.

THIS was a libel against the hull of a new brig built during the last season by David Spear. It was alleged in the libel, that Spear commenced building the vessel in April last, and that the hull was finished and launched on the 6th of February; that the libellant was employed by Spear in building her; and that there remains due to him for his services the balance stated in the schedule annexed to the libel, amounting to \$116,64, which he has demanded, and which remains now unpaid, for which he claimed a lien on

the vessel for his security, and praying that the vessel may be decreed subject to the lien and sold for the payment of what is due.

Spear was duly served with process, but did not appear; but Mr. Purinton intervening for his own interest, entered an appearance and filed a claim as owner, and put in an answer in the nature of a plea to the jurisdiction, alleging that at the time when the labor is said to have been performed, the vessel was and ever since has been wholly owned by citizens of this state, viz. by said Purinton, the respondent, that she is a domestic vessel, and concluding with a prayer that the libel may be dismissed.—Afterwards, upon a suggestion from the court that the objection to the jurisdiction could not be sustained, he put in an answer to the merits, alleging that the vessel was built by Spear for him, denying all knowledge of the libellant's having been employed or having rendered any service in building the vessel, and putting him to the proof of his claim.

Evidence of the declaration of Spear was offered by the libellant, tending to prove that by the terms of the contract he was especially engaged for work upon this vessel, but the evidence was ruled to be inadmissible.

The case was argued by *Fox* for the libellant and by *C. S. Davis* for the respondent.

WARE, *District Judge*. The plea to the jurisdiction has been very properly abandoned at the argument. The objection was presented in precisely the same form in the case of *Peyroux v. Howard*; ¹ that is, that all the parties were citizens of the same state, and overruled both in the district and supreme court. The same question was also raised and decided in the same way in the case of *Davis v. a New Brig.* ² In cases of admiralty and maritime jurisdiction the competency of the court does not depend on the citizenship of the parties. The jurisdiction is founded on the subject matter, and attaches whoever may be parties and wherever they may reside. And that contracts of material men, for materials found and labor performed in building and repairing vessels, are

¹ 7 Peters, 324.

² Gilpin, 474.

matters of admiralty and maritime jurisdiction, has been too often decided to admit of controversy at this day. Over these contracts the admiralty exercises a general jurisdiction. It will in all cases give a remedy *in personam*; and whenever the law gives a lien or privilege against the vessel it will enforce it by process *in rem*.¹ In every proceeding *in rem*, therefore, founded on such contracts, the question is not whether the court can take cognizance of the subject matter, but simply whether in the particular case the creditor has a right to look to the vessel itself for his security, or is confined to his personal remedy against the debtor.

By the general maritime law, material men, under which terms in the language of the admiralty are included all persons who supply materials or labor in building or repairing vessels, or furnish supplies which are necessary for their employment as provisions for the crew, have, in addition to the personal liability of the debtor, a lien on the vessel for their security.² It is commonly said that this principle was borrowed by the maritime from the civil law.³ But it seems more probable that it originated in the maritime usages of the middle ages, where we find the origin of all the general principles of the law of the sea. The Roman law did, it is true, allow to those who loaned money for the building, repairing or the supplying of vessels, a privilege against the vessel.⁴ But in that law a privilege did not amount to an hypothecation.⁵ The first only gave a *jus prelacionis*, a right of prior payment out of the thing, before it could be taken by unprivileged creditors. It was like the priority laws of the United States,

¹ The General Smith, 4 Wheaton, 439; the Aurora, 1 Wheat. 104; the Jerusalem, 2 Gall. 345; the Robert Fulton, 1 Paine, 620; the St. Jago de Cuba, 9 Wheat. 409; the New Jersey, 1 Peters Ad. Rep. 223, the Eagle, Bee, 78.

² Ordinance de la Marine, liv. 1, tit. 14, art. 16; 1 Valin, 363; Consulat de la Mer, ch. 82, 33, 34, Boucher's translation; Cleirac, Jurisdiction de la Marine, p. 851, art. 18, No. 5, 6.

³ Abbott on Shipping, pp. 108-9.

⁴ Dig. 20, 4, 5 and 6; Dig. 42, 5, 26 and 34.

⁵ Peckius ad rem naut; note of Vinnius, 6, page 233; Voet, ad Pand. 20, 2, 28, and 20, 4, 19; Vinnius, Select. Juris Quæst. lib. 2. Q. 4. Heinn. ad Pand. Pars 6, N. 263.

and did not attach as a lien on the thing. And the privilege of material men for supplies furnished for a vessel was also postponed to that of the fisc. But hypothecation gives a *jus in re*, a species of proprietary interest in the thing itself. And in the maritime law every privilege imports a tacit hypothecation.¹ If therefore it was adopted from the Roman law, it was adopted with an important modification, giving to the privileged the rights of an hypothecary creditor, and raising the privilege to an hypothecation.

But this principle of the maritime law is not acknowledged by the common law and has never been received by the commercial jurisprudence of England.² It has however been partially adopted in the maritime law of the United States. Our law allows the lien when the supplies are furnished to a foreign vessel, and for the purposes of the lien, a vessel is considered as a foreign vessel when she is in a port out of the state to which she belongs or where her owners reside. But when supplies are furnished to a vessel in the state where she belongs and is owned, no lien is created by the maritime law of the United States. If however it is allowed by the local laws of the state, it may be enforced by process *in rem* in the admiralty.

In the present case the labor was performed on a new vessel owned in the place where she was built, and being a domestic vessel, whether the creditor has a lien upon her for the value of his services, depends entirely on the law of the state. The lien is claimed under an act of the legislature of Maine, of February 19, 1834, ch. 626, § 1. This act provides "that from and after the passing of this act, all ship carpenters, caulkers, blacksmiths, and joiners, or other persons, who shall perform labor or furnish materials for and on account of any vessel building or standing on the stocks, by virtue of any written or parol agreement, shall have a lien on such vessel for his or their wages until four days after said vessel is launched, and may secure the same by an attachment on said vessel; which attachment shall have prece-

¹ Emerigon, *Contrats a la Grosse*, ch. 12, § 1 and 2.

² Abbott on Shipping, 109.

dence of all other attachments where no such lien exists." That labor was actually performed by Read in the building of the vessel has been sufficiently proved and is not now denied. The question which has been discussed at the bar is, whether it was performed under such circumstances as entitle him to the benefit of the law. For it is not sufficient that materials be furnished, or labor and service rendered in the construction of a vessel. This must be done by virtue of an agreement; and what sort of an agreement will bring a party within the privilege of the act is the precise question which is involved, and has been learnedly argued in this case.

There was no written contract between the parties, and there is no direct proof of the terms of the agreement by which Read was engaged. They are left by the testimony to be inferred from the circumstances under which the engagement was made and the manner in which the contract, whatever it might be, was executed. It appears that about the 16th or 17th of April, Read came to the house of captain Spear, the builder, a stranger and by birth a foreigner, in a state of great destitution, and wished for employment. Spear took him into his house, furnished him with some clothing and employed him a few days for his board. He then left and went to Portland to seek business, but not being successful in obtaining it, he returned and was again employed by Spear; and continued in his service until November, when he was finally discharged. For the first month he was employed exclusively in gardening, planting, laying stone wall, and other labor on the farm. About the beginning of June he went into the smithery and was engaged part of the time at his trade as a blacksmith, in doing the iron work for the vessel. Butman, one of the witnesses, who was also employed as a blacksmith for two months and eight days from the 19th of May, says that during that time he constantly worked with Read, and that about half the time they worked in the shop and about half of the time on the farm, on the highways, in the woods getting timber, and various work. After that period and until Read was finally discharged, his employment was not wholly, but was more exclusively upon

the vessel, either in the shop preparing the iron work, or in the yard boring on the ship. While in the smithery, however, he was not wholly occupied in work for the vessel, but occasionally did other jobs which were brought by the neighbors to the shop, but all on Spear's account. The proportion of the time employed upon the vessel is not clearly proved, but is estimated by some of the witnesses at about three fourths of the whole period from the commencement to the close of his employment.

It has been already observed that the statute does not create a lien for materials and labor upon the simple and naked fact that they have been actually employed in the building of the vessel; the lien arises only when the materials and labor are furnished by virtue of a previous agreement. The argument of the libellant's counsel is, that the performance of the labor or the supply of the materials having been proved, and the actual appropriations of them to the finishing of the vessel, it is unnecessary to proceed further and show the agreement in pursuance of which it was done; but the fact that it was done in the execution of a previous contract, results as a presumption of law. To a certain extent this is undoubtedly true. If labor has been performed for another with his knowledge and under his direction, or goods have been furnished, received, and consumed by him, the law will certainly imply from these facts an agreement. But what agreement will be presumed? Why; on the part of the person who receives the benefit, that he agreed to pay what they were reasonably worth, and ordinarily nothing more. Suppose a man, who is by trade and occupation a ship builder, hires a laborer to work for him a year, but the particular terms of the engagement, except its duration, are not susceptible of proof. The law will imply nothing more than that he should perform such services as are usually required of hired laborers, and after the contract is executed, that the hirer shall pay him a reasonable compensation for such services. Again, suppose such a ship builder to purchase a quantity of lumber suitable for ship building; if the particular terms and conditions of the contract do not appear, the law will imply nothing more on the part of the purchaser ordinarily, than

a promise to pay what it is worth. A contract or agreement requires, as essential to its existence, the assent of two or more minds ; *duorum vel plurium in idem placitum consensus*.¹ If particular pacts or conditions are annexed to the contract, qualifying its general nature or varying and modifying its general obligations, there must be the same assent of the parties to these conditions to give them validity, as to the substance of the contract. It must be a consent *in idem placitum*. If the parties have not taken care to express these accessory conditions in the terms of the contract, or what juridically amounts to the same thing, if they cannot be proved, the law will not presume the assent of the parties to them, unless, from the circumstances of the case, or the ordinary course of dealing, these are plainly to be inferred.

Let us now apply these general and familiar principles of law to the evidence in this case. The fact, that the libellant labored for Spear, and under his direction from April to November, and that he was part of the time employed upon the vessel, is admitted. That the labor was performed by virtue of an agreement, will be inferred as a presumption of law. But the law will infer from the general fact nothing more than a general contract for labor ; and what is there in the present case that will authorize the presumption of anything beyond this. Nothing, except what results from the manner in which he was actually employed, and the fact that he was a blacksmith by trade. As to the kind of labor in which he was employed, it appears that for the first month he was exclusively occupied in various work on the farm ; for the two following months, about one half of the time on the farm, and one half in the blacksmith's shop ; and during the residue of the term of his service, principally in the shop at his trade in doing the iron work for the vessel, or in the yard working on the ship ; but part of it also, on the farm. Taking then the whole course of his employment, the result will be against this presumption of a special contract with him as a mechanic, for labor on the vessel. Whatever presumption might arise from the fact that he was by trade a blacksmith, is overcome by the various kind of

¹ Dig. 2, 14, 1, 51.

labor in which he was actually employed without any objection on his part. The inference certainly is, that he was hired rather as a sort of jack-at-all-trades, than as a master of one. And this receives confirmation, partially at least, by all the evidence which has been offered touching the rate of wages for which he was engaged. It appears from his own declaration, that Spear would consent to give him but fourteen dollars a month, though he said that he ought to have sixteen. But all the proof is, that the rate of wages for a blacksmith at this time was not less than a dollar a day, about double the rate at which he was to be paid. It appears to me, that the fair conclusion to be drawn from all the facts, is, that this was a general agreement for service as a hired laborer, and not a special contract for any specific kind of labor.

Does a person hired as a laborer generally, and employed under that general contract part of the time in work upon the vessel, come within the fair intent and meaning of the legislature, so as to be entitled to a lien on the vessel for his wages during that part of the time that he is so employed. The language of the law is, any persons of the description named in the act, who shall perform labor and furnish materials for or on account of any vessel, by virtue of a written or parol agreement. The labor must be performed, or the materials furnished in pursuance of an agreement, and it must be an agreement to do this for or on account of the vessel to which the lien attaches. The intention of the law is to give to that class of persons, called, in the language of the admiralty, material men, a privilege against the vessel for their security, not universally, and in all cases where their labor or the materials furnished by them have been applied to the building of a vessel, but where this has been done under a contract for or on account of the vessel to the use of which they have been appropriated. The contract must therefore have itself a reference, tacit or express, to the vessel against which the privilege is claimed. It is not intended to be said, that in all cases, a mechanic, who is employed in building a vessel, or a material man, who sells lumber which is used in the construction of it, must, in order to maintain their lien, prove that the vessel was

expressly named in the contract. In ordinary cases, or certainly in very many cases, this will be presumed. And these contracts being made while the vessel is in the process of building, and the labor or materials appropriated to her construction, it would require some countervailing circumstances to overcome the natural presumption, that the contracts were made with a view to the particular vessel. I fully agree also with the libellant's counsel, that the lien, being one beneficial to the general interests of commerce, and having its foundation in natural equity, the law ought to receive a liberal construction to carry into full effect the beneficent intentions of the legislature. It belongs to that class of liens, which the law habitually favors. And the act being in fact but a mere recognition or adoption of a principle of the general maritime law, as old as the law itself, a court of admiralty would be the last tribunal to feel any reluctance in giving to it its fullest and most beneficial operation. But to extend the privilege to a case like the present, would be carrying the lien beyond what seems to me to be the obvious and clear intention of the legislature, and also further than it would be supported by the principles of the general maritime law.

An appeal having been taken, in the above case, to the circuit court of the United States, the question is still pending.

LEGISLATION.

ILLINOIS. The eleventh general assembly of this state, at a special session thereof, begun and held at Springfield, on the ninth of December last, passed a considerable number of statutes, chiefly of a local and private character.

Sheriffs, Constables, &c. Whenever any sheriff, coroner, constable, justice of the peace, or probate justice of the peace, shall, after proper demand made, fail, neglect, or refuse, to pay over any sum or sums of money, collected or received by such officer, in and by virtue of his office, his said office shall be forfeited and vacated.

Attachment. Every head of a family, who follows the cultivation of the soil, for the maintenance of himself and family, is entitled to retain one horse or yoke of oxen, not exceeding in value sixty dollars, in addition to other articles previously exempted; or if he be a mechanic, laboring at his trade to support his family, sixty dollars worth of tools suited to his profession.

RHODE ISLAND. Among the statutes passed by the general assembly of the state of Rhode Island and Providence Plantations, since January, 1839, we find the following:

Railroad Commissioners. A board of railroad commissioners is established, to be chosen annually by the general assembly at its May session, and to consist of not less than three persons, with authority, upon complaint or otherwise, to examine into any or all of the transactions and proceedings of any railroad corporation, authorized and established in Rhode Island, in order to secure to the citizens thereof the same privileges, in regard to transporta-

tion of persons and property, at all times, as may be granted by any such corporations to the citizens of any other state. June 14, 1839.

Imprisonment for Debt. Any person, committed to jail for debt upon mesne process or execution, nonpayment of any military fine, or town or state taxes, surrender or commitment by bail, or by former sureties for the liberty of the jail yard, may be liberated from his imprisonment, upon filing in the clerk's office of the supreme judicial court his petition for the benefit of the acts for the relief of insolvent debtors, if he have not a petition already pending at the time, and giving bond with surety, satisfactory to the sheriff of the county, conditioned to return to jail within ten days after his petition shall be withdrawn or finally disposed of by said court, if not granted. June 15, 1839.

Corporations. No turnpike, railroad, or bridge corporation shall be capable in law to take or hold any land in Rhode Island, in fee, or for life or lives, or for term of years, or by any other title or tenure, or for any other use than such as is expressly provided in the charter of such corporation. Jan. 14, 1840.

Conveyances of Real Estate. Any conveyance of lands within this state, or any instrument relating thereto, executed without the limits of the United States, may be acknowledged before any ambassador, minister, or recognised consul of the United States, in the country where the instrument shall be executed. Jan. 17, 1840.

Separation of Married Persons. The supreme judicial court is authorized, upon application of any married person, and for the causes for which by law a divorce may be decreed, or for such other causes as may seem to them to require it, to assign to such persons a separate maintenance out of the estate or property of the husband or wife of such person, in such manner as they may deem best, with full power also to regulate the custody of children of the persons so complaining. Jan. 17, 1840.

MASSACHUSETTS. The general court of Massachusetts, at the January session thereof, in the present year, passed ninety-seven statutes and sixty-two resolves, of which fifty-nine were approved by the governor.

Spirituuous Liquors. The act, passed April 19, 1838, to regulate the sale of spirituuous liquors, is repealed. Chap. 1.

Apprehension of Criminals. The selectmen of towns and the mayor and aldermen of cities are authorized, when, in their opinion, the public good may require it, to offer a suitable reward to be paid by the town or city, not exceeding two hundred dollars, for the securing of any person charged with any capital or other high crime or misdemeanor committed therein. Chap. 75.

Passenger Carriers. In case of the loss of the life of any person, being a passenger, by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, such proprietors and carriers are made liable to a fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs. Chap. 80.

Evidence of Marriage. Whenever, on hearing of any application for divorce, the fact of marriage is required or offered to be proved, evidence of admission of said fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, from which said fact may be inferred, shall be received as competent evidence for consideration, whether the marriage to be proved was contracted in this state or elsewhere. Chap. 84.

Fire from locomotive engines. In the case of injury done to a building or other property, by fire communicated by a locomotive engine of any railroad corporation, the corporation is made liable in damages to the party injured. It may insure property along its route on its own behalf. Chap. 85.

GEORGIA. Among the acts of the general assembly of the state of Georgia, passed at the annual session in November and December, 1839, we find but very few of any interest to the citizens of other states.

Attachments and Garnishments. Affidavits upon which attachments or garnishments may issue may be made by the nonresident creditor before the commissioner of the state of Georgia to take acknowledgments of deeds, or before any judge or judicial officers authorized to administer oaths, or before any notary public. Dec. 21, 1839.

SOUTH CAROLINA. The general assembly of this state, in December, 1839, passed thirty-two acts, many of which are of considerable length and much local importance, viz., chap. 7, concerning the office and duties of magistrates; chap. 9, concerning the office, duties and liabilities of sheriffs; chap. 10, concerning the office and duties of ordinary; chap. 11, concerning the office, duties and liabilities of coroner; chap. 12, to regulate the office of constable; and, chap. 18, concerning the office and duties of clerks, registers of mesne conveyances, and commissioners of locations. We find but few of any general interest.

Executors and Administrators. Executors, &c., are authorized to become purchasers at the sales of the property of their testators, &c., under whatsoever authority the same may be made, but shall be liable to the parties interested, for the actual value of the property at the time of sale, in cases where it may be sold at an under price. Chap. 14.

ALABAMA. The general assembly of the state of Alabama, at the annual session thereof, which commenced on the first Monday in December, 1839, passed one hundred and two public and general acts, one hundred and sixty-seven private and special, and sundry joint resolutions.

Depositions. Whenever the testimony of any female witness may be necessary, in any civil case, it shall be taken by deposition, whether the witness live in the county where the cause is pending or not. No. 15.

Witnesses. Commissioners authorized to examine witnesses are empowered to issue subpoenas to compel their attendance. No. 38.

Bills of Exchange. In the case of suits by the bank of Ala-

bama or any of its branches, on bills of exchange and promissory notes, it is made the duty of the attorney to include in the writ or notice the names of all the parties liable, and to issue as many writs or notices as there may be counties in which the parties reside. No. 58, § 1.

If no defence is interposed in such suit, one judgment is to be rendered against all the parties who are legally before the court, and against whom a recovery may be had; except that a separate judgment is to be rendered against the acceptor of a bill, where he is liable in a different sum from the other parties. § 2.

If any defence is made, and the plaintiff, or any of the parties, demand a severance, the proceedings are to be the same as if the parties had been severally sued. § 3.

Disturbance of Religious Meetings. The wilful interruption or disturbance of any assembly of people met for religious worship, either by making a noise, or by rude or indecent behavior, at or so near the place of worship as to disturb the order and solemnity of such meeting, is punishable by a fine of not less than five nor more than fifty dollars. No. 50.

Reporter of Decisions of the Supreme Court. The office of reporter is abolished, and its duties imposed upon the judges, with an increase of salary. No. 75.

Administrators. The judges of the county courts are authorized to appoint suitable persons in their respective counties, to take charge of the estates of deceased persons, in cases where no other person will administer on the same. No. 86, § 1.

They are also authorized to appoint guardians, in cases where no one will act as such, § 2,

CRITICAL NOTICES.

- 1.—*Manual of Political Ethics; designed chiefly for the Use of Colleges and Students at Law.* Part II. Political Ethics Proper. By FRANCIS LIEBER. Boston: C. C. Little and James Brown. 1839.

THE first part of this work was reviewed in the forty-first number of our journal (April, 1839), and the second part brings this elaborate work to a conclusion. The second part is more extended than the first, and is divided into five books, and it will be found an equally important and valuable gift to the politician and the statesman.

The third book (which is the first book of the second part, the first part having been comprised in two books) commences with some observations on the importance of a thorough acquaintance with our ethic relations in politics, derived from a consideration of the character of our race, the spirit of the age in which we live, and the direction which has been given to political studies. Private morality is of the highest importance to the well-being of the state, for the best laws will be inoperative without a corresponding sense of duty and virtue. "There are certain virtues, as well as vices, which are of peculiar importance to the state, because they either prompt more frequently to public acts, or come more often than others into play in political life." These form a proper subject of discussion, before proceeding to consider those important situations, in which the citizen is called upon conscientiously to act, although not guided by any law.

After these preliminary observations, the remaining portion of the first chapter of the third book is devoted to the virtue of justice, a most indispensable one to the state, and even constituting its very essence. In connection with this portion of his subject, the author treats of the question, Whether a citizen is in conscience allowed to do all that the laws permit ; which he decides in the negative.

The second chapter treats of the kindred virtues of fortitude, perseverance, calmness, firmness, and consistency. "That the citizen be," says Mr. Lieber, "honestly and firmly persevering, requires that his purpose be good, his cause just, that he adapt his means to the purpose, and his purpose to his means ; that he concentrate his means for the one great object in view, that he be ever mindful that repeated and uninterrupted action may compensate for the absence of great power, and that in cases of the greatest trial, when the struggle comes at the last between nearly balanced powers, a trifle must decide." In connection with these virtues, he also treats of the want of calmness, in four effects, namely, fretfulness, discontent, inconsistency, and obstinacy, the counterfeit of perseverance. He remarks upon the obvious injustice of accusing a statesman of inconsistency, on account of a single act or measure.

"It will appear evident, from the meaning which we have attached to the word consistency, which is not to be judged of by the form or sign of the action, but by its spirit, that to be truly consistent, the minor consideration must give way to the greater, and finally all considerations to the ultimate end of all government, the welfare of the people ; so that a citizen may with perfect consistency and conscientiousness adopt, support, or defend a measure today, which he strenuously opposed at an earlier period, if circumstances have essentially changed, not to speak of an improved insight into the subject. Lord Wellington and Sir Robert Peel long opposed catholic emancipation ; let us suppose both to have been honest in doing so ; if so, they cannot be charged with inconsistency for having carried that measure, in 1829, if the duke, then at the head of the administration, was equally honest in declaring, on that occasion, that he must choose between emancipation and civil war of the worst description."

The third chapter discusses the virtues of moderation, freedom from excitement, passion, and the impulse of revenge, and the evils

to states and governments, which spring from the opposite defects ; also honesty and veracity in politics, and whether the duty of speaking the truth is subject to any exceptions, or not. He also examines the subject of honesty as applied to moneyed value, as deserving especial attention in political ethics. The desire of wealth is a general passion and salutary in its influences, unless carried to an extreme. Pecuniary independence is of the last importance to a statesman. He cannot act boldly and honestly, if he be encumbered with debt or under pecuniary obligations to others. The evils of speculation, of fraud upon the public revenue, of smuggling, &c., are strikingly illustrated.

The fourth chapter commences with an animated defence of ambition, when well regulated and restrained within due limits. Political apathy is a most serious evil ; also, political ingratitude. Ambition is not inconsistent with modesty, and is not to be confounded with vanity, which is content with the symbol without the reality,—the title or distinction without the power. Some beautiful observations follow upon the subject of friendship, and upon its importance as an element in the social order, and upon the extent to which the feeling of friendship may be carried by a politician. Favoritism in politics is a very different thing from friendship, though frequently borrowing its name and garb. This is one of the most dangerous vices of governments ; as is also nepotism, or an unjust and excessive partiality to the members of one's own family.

In the fifth chapter, gratitude and ingratitude are fully discussed. Gratitude is not to be confounded with popularity. Popularity itself may be sudden, founded upon momentary caprice ; or permanent, founded upon esteem. Undue love of popularity is a pernicious weakness in a statesman ; it should come spontaneously, and not be sought after. Liberty finds a formidable enemy in excessive personal popularity.—Some eloquent passages are devoted to a defence of monuments, statues, and other testimonials of public respect. Mr. Lieber urges upon the public man, in striking terms, the duty of attention, of observing the signs of the times and narrowly watching the phenomena around him. We should study attentively the history of our country and its institutions, and espe-

cially the more brilliant portions of its history. Even newspapers should not be deemed unworthy the attention of public men.

In the sixth chapter are shewn the mischiefs which result to political society from the vice of licentiousness, which undermines the family, the primary foundation of society. The evils of a want of chastity, both among the higher and lower classes, are forcibly delineated. Political society is deeply interested in the subject of religion, which is wholly opposed to religious fanaticism, which he defines to be all perversion of our actions by undue application or influence of religious doctrines in spheres which are not strictly religious. His remarks on this subject are manly, bold, and just. Persecution is opposed to the spirit of religion; and, besides, we have no right to use political power and authority for religious persecution, because political power is a power arising out of the state, which is the society of right, and right has nothing to do with matters of faith. Indirect and social persecution on account of disagreement in religious opinions, promotes hypocrisy and desecrates religion.

In the seventh chapter the subject of patriotism is examined. A distinction is traced between the patriotism of antiquity and that of modern times. Patriotism is not to be confounded with national self-conceit or that narrow feeling of sectional preference which sometimes counterfeits its aspect. True patriotism is a generous and noble passion, without which no free state could for a moment exist. It is also inconsistent with a jealous distrust of foreigners. Public spirit is a term which has often been used for patriotism, but is not identical with it. "By patriotism," says our author, "we designate perhaps more specifically that sacred enthusiasm which prompts to great exertions, and has the welfare, honor, and reputation of the country at large in view; by public spirit, a practical disinterestedness and cheerful readiness to serve the community and promote its essential success in every way. A perfect stranger to a country might still show much spirit." Some remarks follow on veneration for antiquity; how far it is just and necessary, and under what circumstances it becomes injurious. The age of action is under forty; the conservative element, which is essential

to true liberty, characterizes those who have advanced beyond that age. The common notion, that times grow worse and worse, is a fallacy. A law or institution is not to be retained simply because it is old ; and, on the other hand, it is not to be sacrificed unless it is shewn to be productive of evil.

The above chapter brings us to the close of the third book. The first chapter of the fourth book treats of the all-important subject of education. The author's plan is not consistent with a sketch of a perfect system of education, but only with some general hints and observations. Civil society has the deepest interest, not only in promoting education among the poor and in diffusing elementary education among large masses, but also in the highest possible degree of literary and scientific culture. Thus, scientific expeditions, libraries, and museums, become of great national importance in an industrial, moral, and patriotic point of view. Every member of society should receive an industrial education ; that is, be trained to some employment. Indolence and want of occupation are the fruitful parents of crime. " Besides the habit of industry," says Mr. Lieber, " the four following are of much importance in education applied to politics, the habit of obedience, of independence, of reverence, or whatever it be called, but by which I wish to express that earnestness in contemplating things, which strives to know their real character and connection, and the absence of arrogant forwardness and self-sufficiency, which considers every thing silly, useless or unmeaning, because not agreeing with its own views or not showing its character at once to the superficial observer ; and lastly the habit of honesty." Ancient history and gymnastics should form part of every complete education. The relations to the state, which grow out of the distinction of the sexes, pass next under review. Upon the subject of the duties and position of woman, our author is a stanch conservative, and not disposed to adopt the new-fangled notions of the day. The difference in temperament and organization prescribe different duties, and forbid woman to mingle in the harsh encounters of politics. His views on this subject are entitled to the candid attention of all.

The second chapter discusses the subject of obedience to the

laws ; its origin, influence, and importance, its limitations and exceptions ; also the questions of revolution, rebellion, insurrection, dangers of mob law ; and of informers and a secret police, as means of security. This chapter is rich in historical illustrations, and contains many sound reflections and just observations. The third chapter treats of societies and associations, their influence, dangers, and benefits, and points out the mischiefs of trades' unions. The fourth chapter is upon the newspaper press, which subject is treated with good sense and a sound moral tone ; and he also has a paragraph or two upon the political position and duties of the clergyman. This chapter closes the fourth book.

The first chapter of the fifth book is upon voting, and the duties of the citizen in relation thereto, passing also under review the abuses of the franchise, by intimidation or bribery and various malpractices which sometimes disgrace elections themselves. Every American citizen may be profited by a perusal of this chapter, not omitting the remarks on the practice of betting at elections. The second chapter is upon parties and party spirit, their invariable attendance upon free institutions, their dangers and abuses, the characteristics of a sound party, and how far a good citizen ought to carry his allegiance to a party. The third chapter treats of that balancing power which in a free state is called the opposition, its value as a safeguard of liberty and a check upon the majority, and lays down certain ethical rules in regard to opposition and parties in general. The concluding paragraph is on the dangers of parties formed on the ground of extraction or foreign nationality. The fourth and concluding chapter of the sixth book is upon public men, their physical, mental, and moral qualifications, the knowledge requisite for a public man, and the preliminary requisites for entering upon a public career. We commend this sensible chapter to all those who are apprentices or journeymen at the great trade of politics.

The sixth book is divided into three chapters, all of which are devoted to the various relations of the great subject of representation. This book is among the more valuable portions of the whole work, and may be read with great advantage by every member of

a representative government. He shows the distinctions between a representative government and a direct democracy, also between representative and deputative systems of government. Upon the subject of instruction in general, and especially in its reference to the United States, his views are thorough, elaborate, and profound. He denies the right of instruction and maintains his position with great fulness of learning and power of reasoning. He discusses also the doctrine of pledges in an able and satisfactory manner. Various other topics are also treated of with more or less fulness.

In the first chapter of the seventh and last book, Mr. Lieber treats of executive officers, of the difficulty of controlling them, of the veto in ancient and modern times, of the pardoning privilege, its danger and difficulty, and the rules which should be observed in making use of it. The second chapter treats of judges, courts, and the administration of justice, of the institution of juries and of the rights and duties of jurymen, of advocates, their moral obligations, their political relations to the community, and of the duties of witnesses. The third and concluding chapter is upon war. Mr. Lieber maintains, that just and reasonable wars are not prohibited by either morality or religion, that patriotic wars have raised the character of nations; and these positions he argues at some length. He deems it impossible to settle national disputes by the arbitration of a congress of nations. He treats at length of the moral obligations of war, and the restrictions imposed upon honorable warfare by ethical laws.

We feel that we have done injustice to Mr. Lieber by our imperfect abstract. His volume is crowded with learning, and rich with valuable and profound observations. We are not always disposed to agree with him; but even his opponents cannot read those portions of his work to which they refuse their assent, without improvement. The portions of this volume which we should select as particularly worthy of notice from their ability and independence are, the chapters on honesty and veracity, on education, on woman, on office and office-holders, on the pardoning power,—and, especially, those on instruction, and the representative and deputative systems, which are original, and truly valuable. In respect to

arrangement, this volume is liable to the same criticism as the first, and would be improved by a process of condensation.

- 2.—*A Digested Index of the Statute Law of South Carolina, from the earliest period to the year 1836, inclusive.* By WILLIAM RICE. Charleston : J. S. Burges, 1838.

The plan of this work, so far as we recollect, is novel, at least in this country. It is intended to be a digest of the statute law, sufficient for most practical purposes, put into the form and expressed with the brevity of an index. It will thus be a most valuable appendix to the statutes at large of South Carolina, now a publishing, or nearly completed, and of which we have already spoken. Mr. Rice certainly deserves the praise of extraordinary diligence, this being the fifth octavo volume he has given to the public within the short space of two years.

- 3.—*A Digest of the Cases decided in the Superior Courts of Law of the State of South Carolina ; from the earliest period to the present time. With tables of the names of the cases, and of titles and references.* By WILLIAM RICE, Attorney at Law. In two volumes. Charleston : Burges & James, 1838 and 1839.

Mr. Rice, the present state reporter of the state of South Carolina, besides publishing his two volumes of reports, noticed in our last and present numbers, has recently presented the profession with a digest of the jurisprudence of his state, in two volumes. This digest contains the cases decided in all the superior courts of South Carolina, commencing with Bay's and ending with Hill's reports, besides some of the cases in Brevard's manuscript reports, not yet published. The number of volumes digested is eighteen, namely : Bay's Reports, two volumes ; Treadway's Constitutional Reports, two volumes ; Mill's Constitutional Reports, two volumes ; Nott and M'Cord's Reports, two volumes ; M'Cord's Reports, four volumes ; Harper's Reports, one volume ; Bailey's Reports, two volumes ; Hill's Reports, two volumes ; and Riley's Collection of Cases, one volume. Besides these printed reports, Mr. Rice has inserted several cases, hitherto unreported, from the

records of the court of appeals, and a portion of the cases about to be published, if not already published, from the manuscripts of the late judge Brevard. The latter were in four volumes in manuscript, of which Mr. Rice has digested the third. They will be printed, we understand, in two volumes. Mr. Rice's digest seems to us to exhibit traces of that carefulness and discrimination, which are the chief merits of a work in this department, and it can hardly fail to be of great utility to the profession of South Carolina, to whom it is very properly dedicated, besides affording much valuable help to the practising lawyers of other states.

4.—*Revised Statutes of the State of Arkansas, adopted at the October Session of the General Assembly of said State, A. D. 1837, in the year of our independence the sixty-second, and of the State the second year.* Revised by WILLIAM McK. BALL and SAM. C. ROANE. Notes and Index by ALBERT PIKE. Published by authority of the General Assembly. Boston: Weeks, Jordan & Company, Publishers, 1838.

The seventh article of the constitution of Alabama, section 9, provides, that, "Within five years after the adoption of this constitution, the laws, civil and criminal, shall be revised, digested, and arranged, and promulgated in such manner as the general assembly may direct; and a like revision, digest, and promulgation shall be made within every subsequent period of ten years." In pursuance of this requisition, the general assembly, by a statute passed October 6, 1836, authorized the governor to appoint two competent persons to revise and arrange the statute laws of the state, and prepare such a code of civil and criminal laws, as might be necessary for the government of the same, to report at the next session of the general assembly. Under this statute, Messrs. Ball and Roane were appointed commissioners. Their labors were presented to the assembly in October, 1837, in which the statutes reported were acted upon, and passed with such amendments as were thought proper. The statutes thus prepared and enacted were published in the volume before us, under the editorial supervision of Mr. Pike, the present state reporter.

This volume, besides the statutes, contains the constitutions of the United States and of Arkansas, the treaty of cession of Louisiana, the act of admission of Arkansas, and sundry other documents relating thereto. The statutes are arranged alphabetically in one hundred and fifty-nine titles. Chapters 44, entitled *Criminal Jurisprudence*, and 45, entitled *Criminal Proceedings*, constitute the criminal code.

5.—*Lectures on Moral Philosophy, delivered before the Philosophical Association at Edinburgh, in the winter session of 1835, 1836.* By GEORGE COMBE. Boston: Marsh, Capen, Lyon & Webb. 1840.

Among the important topics treated of by the author of the "Constitution of Man," in this volume, the lectures on the "causes of pauperism and the subject of criminal legislation,"—on the "duty of society in regard to criminal legislation and prison discipline,"—on "guardianship,"—"surety,"—and the various forms of government,—cannot but be interesting to those of our readers, who, in common with ourselves, look to the science of phrenology and the teachings of its greatest living master, for light and guidance in reference to the all important subjects to which it has been applied by him. We propose, in our next number, to present our readers with Mr. Combe's views on some, if not all, of the above-mentioned topics.

6.—*An Introductory Lecture on the Study of English Law, delivered in University College, London, on Monday, December 17, 1838.* By P. STAFFORD CAKEY, M. A., Professor of English Law. London: Taylor & Walter, 1839.

The learned professor of English law in University College, in a well written lecture of forty odd pages, presents us with an outline of the plan of his course, and with the reasons which have induced him to depart from the plan pursued by Blackstone and other professors. The main division which he proposes, is into public and private law. Under the first branch, he includes :

1, International law ; 2, Constitutional law ; 3, Colonial law ; 4, Administrative law ; 5, Ecclesiastical law ; and, 6, Criminal law. The second branch, private law, embraces : 1, The law of Property ; 2, The law of Torts ; 3, The law of Contracts ; 4, Commercial law ; 5, The law of Persons ; 6, The administration of justice in courts of equity ; and, 7, The administration of justice in courts of common law. Each of these heads is succinctly explained. We do not think this arrangement so defective as that which it is intended to supercede ; neither do we think it so scientific and philosophical as one might be made ; but it perhaps will be found more practically successful, than either the old system, or any new one founded in a mere theory. With what propriety and upon what principle the professor proposes to treat of proceedings in equity, before proceedings at law, we are unable to see. It seems to us, that it would be as hopeless an undertaking to make one comprehend the former, without a previous knowledge of the latter, as it would be to explain the law of pleas in abatement, before treating of the subject of actions in general. We have been much pleased with the liberal and enlightened views which manifest themselves on every page of this well written production.

7.—*Entwurf eines Strafgesetzbuchs für das Grossherzogthum Hessen. Uebergelegen an die zweite Kammer der Stände des Grossherzogthums Hessen. Darmstadt, April 22, 1839.*

This project is an additional example of the demand for legislative labors, for the improvement of the criminal law, in the states of Germany. It is divided into two parts, a general and a particular part, and consists of sixty-eight titles and four hundred and forty-eight articles ; and was prepared in pursuance of an ordinance of June 30, 1836. It is accompanied by a short exposition, drawn up by the ministerial counsellor, Dr. Breidenbach,

8.—*The Attorney General's Annual Report, 1840.*

In pursuance of the statute of 1839, ch. 157, the attorney general of Massachusetts has considerably enlarged and improved

his report of the present year, by the addition of a great number of new facts connected with the perpetration and punishment of crimes. An increased attention to what is called the statistics of crime, whether on the part of the government or its officers, is gratifying; and will, it is to be hoped, contribute some day to bring about those improvements in the criminal law and its application, which are now but little more than hoped for; albeit the contempt expressed by the author of "Chartism," for "Statistic Science," be not wholly unfounded.

9.—*Reports of Cases in Chancery, argued and determined in the Court of Appeals and Court of Errors, of South Carolina, from December, 1838, to May, 1839, both inclusive.* By WILLIAM RICE, State Reporter. Charleston: Printed by Burges & James, 1839.

In our last number we noticed Mr. Rice's first volume of law reports, and then took occasion to quote that part of his preface, in which the present judicial organization of the state of South Carolina is described. The volume before us contains the equity cases, both in the court of appeals, and in the court of errors, for the period mentioned in its title. The duties of the reporter, in the preparation and publication of the equity cases, are the same as those which are required of him in regard to the cases at law. He is to publish only the decisions, and not the arguments of counsel. And he is required by law to do this within a year from the time when the decisions are pronounced. Understanding this requisition as Mr. Rice does, and publishing his cases in volumes instead of numbers, the practical operation of the provision is, that he is obliged to publish some of the cases, within six months of the time of their decision. This circumstance is alluded to by Mr. Rice, in his preface to the present volume, with the remark, that if the requisition applied only to "the publication of either the law or equity reports, *separately and exclusively*, it is believed that this period would afford little time enough to enable the reporter to bestow that carefulness and diligence in the performance of his duties, which their importance, as well as a

regard to his own reputation, would seem to require." If any apology, therefore, were needed for any deficiency in the execution of his task, Mr. Rice might reasonably enough find it in the shortness of the time allowed him. But we see no traces of any such deficiency in the volume before us; and we are not disposed to think less favorably of Mr. Rice's qualifications for the office of reporter, from the present specimen of his labors, than we expressed ourselves in our notice of his law reports. Of the cases themselves, we have not given them so thorough an examination as to be able to speak of their importance and value. Some of them will be found in the digest of cases contained in our present number. As the compensation allowed by the state of South Carolina, for the performance of the duties of reporter, "is barely adequate to defray the expense of printing," we trust the reporter will receive a reward for his labors, by an extensive sale of his publications.

10.—*Bibliotheca Juridica, oder Verzeichniss aller brauchbaren in älterer und neuerer Zeit, besonders aber vom Jahre 1750 bis zu Mitte des Jahres 1839 in Deutschland erschienenen Werke über alle Theile der Rechtsgelehrsamkeit und deren Hilfswissenschaften. Zuerst herausgegeben von THEOD. CHRIST. FRIEDR. ENSLEN. Von neuem gänzlich umgearbeitete Zweite Auflage von WILHELM ENGELMANN. Nebst einem vollständigem Materienregister. Leipzig, Verlag von Wilhelm Engelmann, 1840.*

Though this work, which purports to give the titles of all the usual works of jurisprudence published in Germany, both in ancient and modern times, and especially from the year 1750 to the year 1839, makes no pretension to a scientific character, being in fact nothing more than a bookseller's catalogue, prepared and arranged by a bookseller, we have no doubt it will be found quite as useful and quite as easily consulted, as the much larger and more pretending works of Lipenius and his continuators. The index of subjects appears to be prepared with great care, and, though alphabetically arranged, is sufficiently scientific for all the purposes which it has in view. The immense number of works, the titles

of which are contained in this catalogue, would afford convincing proofs, if any such were needed, of the great industry of the German authors, and the prodigious activity of the German press.

11.—*Code de Commerce du Royaume de Hollande, traduit par M. WILLEM WINTGENS, avocat a la haute cour de la Hage, précédé des lois nouvelles sur l'organisation judiciaire du royaume de Hollande et du titre du code de procédure civile, relatif a la contrainte par corps.* Rennes, Paris, A la Hage, 1839.

This volume constitutes the seventh number of Mr. Victor Foucher's Collection of the Civil and Criminal Laws of Modern States. It contains the new commercial code of Holland, preceded by several other laws, which, as the editor remarks, are its "indispensable complement." Mr. Foucher's advertisement being short, we give it entire :

"The commercial code, which is here presented to the public, has been in operation since the first of October, 1838. Its first titles were submitted to the chambers of the kingdom of the Netherlands on the twenty-second of October, 1822, and the concluding ones were adopted on the eleventh of August, 1826. In consequence of the revolution, which separated Belgium from Holland, the execution of the code was suspended; and time was afforded for a complete revision, by turning to account the observations and the labors, of which it had been made the subject by several distinguished juriconsults. The legislative work, which has gone through this double ordeal, is without doubt the most complete in commercial matters, and, especially, in regard to every thing which concerns maritime commerce.

"It is gratifying to observe, that the old French ordinances and the commercial code of our country are also the foundations upon which the Netherlandish law has been built; it must at the same time be acknowledged, that the Dutch legislator has introduced into it many important modifications, and has completed its provisions by a great number of new ones, worthy of one of the first commercial nations of the world. The commercial code of Holland contains *nine hundred and twenty-three* articles; the French code, which is much shorter, has but *six hundred and forty-eight*.

"We are indebted for the translation of this code to William Wint-

gens, doctor of laws, of the Hague, to whom we here express our thanks; but we have found it necessary to add several other laws, which are its indispensable complement, especially considering the provisions of article 357, which require that every captain of a ship should have on board a copy of the code. These additions are:

"1. The new laws of the judicial organization of the kingdom of Holland; these laws make known the organization and the limits of the competence of each jurisdiction;

"2. Those articles of the civil code, which are referred to in the commercial code, and which explain its provisions; these articles are inserted as notes to the corresponding articles of the commercial code;

"3. The title of the new code of procedure, relative to constraint by means of the body.

"This volume, therefore, which we deliver to the public as the seventh number of our collection of the civil and criminal laws of modern states, will serve at the same time not only as a manual for every person engaged in commercial pursuits, but also for every captain in relation with Holland, or navigating within her possessions."

12.—*Acte public sur la Revendication des Meubles, présenté a la Faculté de Droit de Strasbourg, et soutenu le samedi 31 aout 1839, a trois heures et demie, pour obtenir le grade de docteur, par JEAN-CHARLES-EDOUARD DESTRAIS, avocat, de Strasbourg (département du Bas-Rhin.)* Strasbourg: Silbermann, 1839.

"The distinctive character of the right of property," says the writer of this learned dissertation, "according to the Romans, consisted in the rigorous power of pursuing a thing in the hands of third persons: *non videtur suum esse quod vindicari non possit*, is the language of the Digest (34, 2, 27, § 2); and, for their eminently practical mind, this was perhaps a sufficient definition of the right of property. The action accorded for this purpose to the lawful owner was denominated in the Roman law *rei vindicatio* (revendication)." The subject of revendication is considered at length in the work before us, under the several heads of—Roman law, German law, Ancient French law, the civil code, the commercial code, and the positive law of nations. The term *revendication*, like some titles in our English common law, seems to be quite general, and to embrace many subjects under it,

which it would be impossible to consider with any scientific accuracy, under such a rubric ; any more than it would be to discuss the various relations of property, and questions arising under them in our law, under the head of replevin. Notwithstanding this difficulty, the various subjects connected with the *rei vindicatio* are treated with much fulness and discrimination, and in a very interesting manner in the public act of Mr. Destrais. We wish it was the custom to require similar *public acts* of those who are admitted to academic honors in our law schools.

10.—*Entwurf eines Strafgesetzbuchs für die Republik Bern.*
Bern, 1839.

This project of a criminal code for the republic of Berne, according to a constitutional provision (§ 54), was made known through the press, and every one invited to send his remarks upon it, in writing, to the president of the legislative commission on or before the first of September, 1839. The criticisms thus obtained were then laid before the great council by the legislative commission, accompanied by the project. Like most of the recent projects, which we have seen, that have been prepared in the different states of continental Europe, this code is divided into two parts :—a general, containing general provisions concerning crimes and their punishment, and a particular part, containing an enumeration and definition of all the particular crimes and their punishment. The whole code consists of two hundred and seventy-nine sections.

11.—*Dell' uso e dell' Autorita delle Leggi del Regno delle due Sicilie, considerate nelle relatizoni con le Persone e col Territorio degli Stranieri.* Opera di NICCOLA ROCCO, relatore presso la Consulta Generale del Regno. Napoli, 1837.

This is an Italian work on the Conflict of Laws, viewed particularly in connexion with the laws of the kingdom of the Two Sicilies, in which country it must have considerable practical utility ; though in other countries it will, probably, only interest the few who pursue our profession as a science. Unlike the work

of Mr. Justice Story on this subject, it has no international character; it is yet, from the extent and variety of its research, and the universality of its principles, adapted in a greater or less degree to all countries. The author, notwithstanding, has considered his subject carefully, gradually moving from point to point, and presented many interesting discussions of some of the great rules of this branch of jurisprudence. He has not, however, allowed himself to be carried abroad, into foreign countries, to consult other than domestic sources, except in comparatively few cases. The English and American jurisprudence is not referred to; though the works of John Locke are quoted.

The work is divided into three books. The first treats of some general matters, which lie at the foundation of this subject, beginning with the reasons of laws, and why man submits to their control; the different qualities of personal and real statutes; the nature of civil and political rights, with the conclusion that foreigners in a country can only exercise civil rights; the nature and different qualities of public offices, and which among them may be filled by foreigners; the capacity of foreigners to give testimony; different sorts of foreigners; nations required to be naturalized in the kingdom of the Two Sicilies. This book closes with the establishment of two grand principles of the science, which are derived from what is called political law, *diritto politico*—public policy; the other from international; the first regulates the power of the laws of a country over the persons of foreigners; the second, over foreign territory.

We will not follow the author through the second and third books, which take up successively the two grand principles which form the conclusion of the first book, and view them in a variety of bearings, treating of different cases that may arise under them. We have been pleased to find, in many of the discussions, that acuteness, elegance, and systematic manner, which so eminently characterize the great Italian jurists of the last century, and show the author to be a worthy countryman of Romagnosi.

It will be observed, that our author bears the same name with the Italian jurist, to whom we were indebted several centuries ago for a little Latin treatise.

INTELLIGENCE AND MISCELLANY.

Theron Metcalf, Esq. The bar of the county of Norfolk, with which Mr. Metcalf had been connected, in the practice of his profession, adopted the following resolution on his recent appointment to the office of reporter of the supreme court of Massachusetts :

“ At a meeting of the Norfolk bar, held on the eighteenth day of December, A. D. 1839, on motion of Meletiah Everett, Esq.,

“ Voted, that the bar of Norfolk hold in high estimation the learning, integrity, and professional character of their late member, Theron Metcalf, Esq.,—about to leave the practice of the law. And while they regret his loss to their fraternity, they have reason to rejoice that he has been called to exercise his preëminent talents and distinguished learning in a sphere of more extended usefulness, wherein the profession may be equally benefited.

“ Voted, that the secretary present a copy of the above vote to Mr. Metcalf, and cause the same to be published in the Dedham Patriot and the Norfolk Democrat.

I. CLEVELAND, *Secretary.*

Judicial Eloquence. In the case of Van Kleeck v. Dutch Church of New York, before the New York Court of Errors, in which the validity of a devise by John Harberdinck was in question, the testator is thus described by Mr. Senator Livingston.

“ The counsel on both sides have given a latitude to their imaginations, and indulged their fancies with a peep through the long avenue of times past, and conjured up the form and figure of the testator. I also can paint to my imagination, the venerable Hollander, seated in his arm chair, which he brought with him from

Holland, about commencing with his will. I see his anxious countenance and venerable form, slowly yet firmly grasp his pen and commence the solemn writing, with these words: 'In the name of God, amen;' with much thought and reflection. He bestowed what he then pleased upon his relatives and friends; his brow was melancholy and heavy, until he came to the clause beginning with item, 'I, the said John Harberdinck, do hereby give, devise and bequeath, unto the minister, elders and deacons of the Reformed Protestant Dutch Church, of the city of New York, and their successors, forever.' Then a calm serenity came over him; he felt that he had fulfilled the main object of all his earthly exertions, which was to do all the good he could during life, and then when eternity appeared opening before him, he found a pleasing reflection, that he had just completed what was near and dear to his heart; and with a smile on his countenance, and a contented mind, I can see him calmly resign his spirit to his God who gave it. Often have I observed the picture, with the coat of arms suspended on the wall over the pulpit, in the North Dutch Church, in the city of New York, in William Street, said to be of the Harberdinck family. The motto underneath is, *Dando Conservat*. Until now I have been ignorant of the interpretation: but by becoming acquainted with this will, it appears to me easily construed. By giving he has preserved it."

[From the *Law Magazine* for November, 1839.]

Anecdotes of Erskine. An action was brought by a gentleman, who, whilst travelling in a stage-coach which started from the Swan with Two Necks, in Lad Lane, was upset and had his arm broken. "Gentlemen of the jury," said Erskine, "the plaintiff in this case is Mr. Beverley, a respectable merchant of Liverpool, and the defendant is Mr. Wilson, proprietor of the Swan with Two Necks in Lad Lane, a sign emblematic, I suppose, of the number of necks people ought to possess who ride in his vehicles."

Pleading for a defendant in a case of breach of promise of marriage, where the lady complainant was on the shady side of

forty, the cunning counsel drolly submitted to the jury that it would have ruined his client to bring home an old-fashioned piece of furniture, where he had not even a place to hang it up in.

When defending a tallow-chandler, under a similar visitation, nothing could exceed the pathos with which Erskine read the love-letters of the simple swain, in which he had written metaphorically of his love burning clear, of his heart being consumed like the wick of a candle,—of the union of wax and spermaceti ;—or the mock solemnity with which he dwelt on the notable conclusion of a Valentine :—" N. B. I have bad news for your brother ; tallow is as high as ever ! " The laughter in the jury-box augured ill for the fair plaintiff, whose damages were reduced to a fraction.

There were several among his rivals in the front seats at nisi prius, who could fence at the carte and tierce of raillery with wit as keen, and repartee as clever, as his own. Some of these passages deserve to survive the chance hour of pleasantry that gave them birth.

On a trial relating to the patent for a knee-buckle, Erskine held it up and exclaimed, " How would my ancestors have admired this specimen of dexterity ! " The one-armed Mingay concluded his speech in reply with : " Gentlemen, you have heard a good deal to-day of my learned friend's ancestors, and of their probable astonishment at his knee-buckles. But, gentlemen, I can assure you, their astonishment would have been quite as great at his breeches."

In an action against a stable keeper for not taking proper care of a horse, " The horse," said Mingay, who led for the plaintiff, " was turned into a stable with nothing to eat but musty hay in the rack. To such feeding the horse demurred."—" He should have gone to the country," retorted Erskine. The jest can only be enjoyed thoroughly by professional readers, being founded on the terms of special pleading ; but unprofessional readers may rest assured that it is good as well as technical.

Another of his daily antagonists was Bearcroft, who, for his vein of grave sarcasm, had been chosen Recorder of the Beefsteak Club.

A young gentleman of good family had married a woman of the town. His relatives and acquaintance deserted him. She plunged her husband into debt, and almost ruined him by her extravagance. He mustered courage to defend an action for goods furnished to her at enormous prices. Erskine was counsel for the defendant; and aware of the wife's previous character, was obliged to make it a ground of appeal to the jury. He praised the amiable feelings of the husband, who had sought to restore his wife to the path of virtue, and inveighed against her base ingratitude, to which the plaintiff had lent himself. "For her he gave up his family, and sacrificed all his connexions." When Bearcroft came to reply, he treated Erskine's eulogium of his client's virtue, and the demerits of his wife, as mere burlesque. "My friend reproaches his client's wife with forgetfulness of the debt of gratitude which she owes him, that for her he had given up all his connexions; but the balance of obligation will be found on her side—for, for him, she gave up all mankind."

Erskine usually brought his arguments, says Mr. Espinasse, written at length in a little marble-covered book, from which, even after long experience in his profession, he read and cited his cases. Baldwin, a barrister of considerable standing, distinguished for avarice and jealousy of every rising junior, affected to ridicule Erskine's mode of preparing his arguments, saying on one occasion, with a sneer, that he wished Erskine would lend him his book. "It would do you no harm, Mr. Baldwin," said lord Mansfield gravely, "to take a leaf out of that book, as you seem to want it."

At the expense of this low practitioner Erskine indulged in one of those *jeux-de-mots* to which he delighted in turning legal phraseology. Baldwin lived in the house which is now Surgeons' Hall, in Lincoln's Inn Fields. Being told that he had sold his house to the corporation of surgeons, "I suppose," said he, "it was recommended to them from Baldwin being so well acquainted with the practice of bringing in the body." Baldwin's business was almost wholly composed of motions of course, this of bringing in the body forming the chief.

In this forbidden ground, the region of puns, wit's lowest story, Erskine would disport himself with more than boyish glee. He fired off a double barrel when encountering his friend Mr. Maylem at Ramsgate. The latter observed that his physician had ordered him not to bathe, "Oh then," said Erskine, "you are '*Malum prohibitum*.'"

"My wife, however," resumed the other, "does bathe." "Oh then," said Erskine, perfectly delighted, "she is '*Malum in se*.'"

When a military fever overspread the land, he was called with one voice to the command of the Law Association, composed of the Lincoln's Inn and Temple corps. They had greatly miscalculated his fitness for the command. He could not, we are assured, manœuvre the corps through the most simple movements; and in exercising the battalion, which consisted of six companies, he gave his orders from a card prepared for him by his major, Major Reid. If Erskine ever possessed any military ardor, it was at that time nearly extinguished; he did not enter heartily into the duties of his command, and the parade had no longer any charms for him. A friend wishing to banter him on the subject, told him he had just come from the parade of the excise corps, then the worst in London, and that they appeared to him to be superior to his. "So they ought," said Erskine, "why they are all Cæsars (seizers)." In the same facetious spirit he suggested for the motto of his corps, "*Currat lex*;" and complaining to Bell of his penmanship, declared that his pothooks were nearly as irregular as the Lincoln's Inn volunteers coming to the "present."

An acquaintance having mentioned a relative's illness, Erskine asked the nature of the complaint. Being told, water on the chest, he answered briskly, for the pun interested him more than the invalid, "Then she's not to be pitied; it is lucky in these times to have any thing in one's chest."

Professor Thibaut. This distinguished jurist, who is called by our correspondent the greatest jurist of Germany, died recently at Heidelberg, at an advanced age.

[From the *Legal Observer*, for July, 1838.]

Case of Circumstantial Evidence. In the year 1723, a young man who was serving his apprenticeship in London to a master sailmaker, got leave to visit his mother, to spend the Christmas holidays. She lived a few miles beyond Deal, in Kent. He walked the journey, and on his arrival at Deal, in the evening, being much fatigued, and also troubled with a bowel complaint, he applied to the landlady of a public house, who was acquainted with his mother, for a night's lodging. Her house was full, and every bed occupied; but she told him, that if he would sleep with her uncle, who had lately come ashore, and was boatswain of an Indiaman, he should be welcome. He was glad to accept the offer, and after spending the evening with his new comrade, they retired to rest. In the middle of the night he was attacked with his complaint, and wakening his bedfellow, he asked him the way to the garden. The boatswain told him to go through the kitchen; but as he would find it difficult to open the door into the yard, the latch being out of order, he desired him to take a knife out of his pocket, with which he could raise the latch. The young man did as he was directed, and after remaining near half an hour in the yard, he returned to his bed, but was much surprised to find his companion had risen and gone. Being impatient to visit his mother and friends, he also arose before day, and pursued his journey, and arrived home at noon.

The landlady, who had been told of his intention to depart early, was not surprised; but not seeing her uncle in the morning, she went to call him. She was dreadfully shocked to find the bed stained with blood, and every inquiry after her uncle was in vain. The alarm now became general, and on further examination, marks of blood were traced from the bed-room into the street, and at intervals down to the edge of the pier-head. Rumor was immediately busy, and suspicion fell of course on the young man who slept with him, that he had committed the murder, and thrown the body over the pier into the sea. A warrant was issued against him, and he was taken that evening at his mother's house,

On his being examined and searched, marks of blood were discovered on his shirt and trowsers, and in his pocket were a knife and a remarkable silver coin, both of which the landlady swore positively were her uncle's property, and that she saw them in his possession on the evening he retired to rest with the young man. On these strong circumstances the unfortunate youth was found guilty. He related all the above circumstances in his defence ; but as he could not account for the marks of blood on his person, unless that he got them when he returned to the bed, nor for the silver coin being in his possession, his story was not credited. The certainty of the boatswain's disappearance, and the blood at the pier traced from his bedroom, were two evident signs of his being murdered ; and even the judge was so convinced of his guilt, that he ordered the execution to take place in three days. At the fatal tree the youth declared his innocence, and persisted in it with such affecting asseverations, that many pitied him, though none doubted the justness of his sentence.

The executioners of those days were not so expert at their trade as modern ones, nor were drops and platforms invented. The young man was very tall ; his feet sometimes touched the ground, and some of his friends who surrounded the gallows contrived to give the body some support as it was suspended. After being cut down, those friends bore it speedily away in a coffin, and in the course of a few hours animation was restored, and the innocent saved. When he was able to move, his friends insisted on his quitting the country and never returning. He accordingly travelled by night to Portsmouth, where he entered on board a man-of-war, on the point of sailing for a distant part of the world ; and as he changed his name, and disguised his person, his melancholy story never was discovered. After a few years of service, during which his exemplary conduct was the cause of his promotion through the lower grades, he was at last made a master's mate, and his ship being paid off in the West Indies, he, with a few more of the crew, were transferred to another man-of-war, which had just arrived short of hands from a different station. What were his feelings of astonishment and then of delight and ecstasy, when almost the first

person he saw on board his new ship was the identical boatswain for whose murder he had been tried, condemned, and executed, five years before ! Nor was the surprise of the old boatswain much less when he heard the story.

An explanation of all the mysterious circumstances then took place. It appeared the boatswain had been bled for a pain in his side by the barber, unknown to his niece, on the day of the young man's arrival at Deal ; that when the young man awakened him, and retired to the yard, he found the bandage had come off his arm during the night, and that the blood was flowing afresh. Being alarmed, he rose to go to the barber, who lived across the street, but a press-gang laid hold of him just as he left the public house. They hurried him to the pier, where their boat was waiting : a few minutes brought them on board a frigate, then under weigh for the East Indies, and he omitted ever writing home to account for his sudden disappearance. Thus were the chief circumstances explained by the two friends, thus strangely met. The silver coin being found in the possession of the young man, could only be explained by the conjecture, that when the boatswain gave him the knife in the dark, it is probable that as the coin was in the same pocket, it stuck between the blades of the knife, and in this manner became the strongest proof against him.

Fitness of Lawyers for Legislation. It is said that there was an Amsterdam merchant, who had dealt largely in corn all his life, who had never seen a field of wheat growing ; this man had doubtless acquired, by experience, an accurate judgment of the qualities of each description of corn,—of the best methods of storing it,—of the arts of buying and selling it at proper times, &c. ; but he would have been greatly at a loss in its cultivation ; though he had been, in a certain way, long conversant about corn. Nearly similar is the experience of a practised lawyer, (supposing him to be nothing more,) in a case of legislation ; because he has been long conversant about law, the unreflecting attribute great weight to his judgment ; whereas his constant habits of fixing his

thoughts on what the law is, and withdrawing it from the irrelevant question of what the law ought to be ;—his careful observance of a multitude of rules, (which afford the more scope for the display of his skill, in proportion as they are arbitrary, unreasonable, and unaccountable,) with a studied indifference as to that which is foreign from his business, the convenience or inconvenience of those rules,—may be expected to operate unfavorably on his judgment in questions of legislation : and are likely to counterbalance the advantages of his superior knowledge, even in such points as do bear on the question. *Whately's Rhetoric.*

Anecdote of Judge Chase. On an application made to Judge Chase in the course of a cause, the plaintiff's attorney presented his own affidavit, which he had taken care to make quite full enough. The affidavit having been read, the judge thus addressed the learned counsel, in the face of a crowded audience, "Sir, you have laid me under a particular obligation. In that affidavit you have sworn to a point of law, which I had been doubting about for twenty years." The counsel never made Judge Chase's circuit again. *Journal of Law.*

A Narrow Escape. In the administration of criminal justice, we are informed, that the following circumstances occurred. A young man had been arrested, on the charge of knowingly passing a counterfeit bank note—the grand jury had found a true bill against him—and he was placed on his trial. The evidence in support of the prosecution was strong ; the note had been passed in a way to create suspicion ; the prisoner's explanations were embarrassed and unsatisfactory ; and little doubt seemed to remain of his conviction. The evidence was closed excepting the examination of a clerk of the bank, on which the forgery was supposed to have been committed, for the purpose of showing that the note was spurious. The court were detained a short time, he at length arrived ; the note was placed in his hands, he examined it carefully, and pronounced it good. The accused was of course immediately acquitted. *Journal of Law.*

QUARTERLY LIST OF NEW PUBLICATIONS.

ENGLAND.

A Digest of the law of Evidence on the trial of Actions at Nisi Prius. By *Henry Roscoe*. Fifth edition, with considerable additions. By *C. Crompton* and *E. Smirke*.

The Law relating to the Public Funds, including the Practice by Distringas, &c. By *James John Wilkinson*.

A Selection of Precedents from Modern Manuscript Collections and Drafts of Actual Practice, &c. By *Thomas Jarman*. Third Edition. By *George Sweet*. Volumes 5 and 6.

Commentaries on Equity Jurisprudence, &c. By *Joseph Story*. Second Edition.

Commentaries on the Law of Agency, &c. By the same.

A Treatise on the Law of Easements. By *C. J. Gale* and *T. D. Whatby*.

Robinson's Magistrate's Pocket Book. Third Edition. By *J. F. Archbold*.

The Law of Bills of Exchange, Promissory Notes, Checks, &c. By *Cuthbert W. Johnson*.

Martin's Practice of Conveyancing Precedents, with practical notes. By *C. Davidson*. Vol. 3, Part 2.

Practical Forms and Entries of Proceedings, in the Courts of Queen's Bench, Common Pleas, and Exchequer of Pleas. By *William Tidd*. Eighth Edition.

A Practical Treatise of the Law of Vendors and Purchasers of Estates. By *Edw. Sugden*. Tenth Edition.

Archbold's Practice of the Court of Queen's Bench, in Personal Actions and Ejectment. Seventh Edition. By *Thomas Chitty*.

Forms of Practical Proceedings, in the Court of Queen's Bench, Common Pleas, and Exchequer of Pleas. By *Thomas Chitty*. Fifth Edition.

Compendium of the Law of England, Scotland, and Ancient Rome. For the use of Students. By *James Logan*, Advocate. Parts 1 and 2. Of Marriage.

The Law and Practice in Bankruptcy, as founded on the recent statutes. By *J. F. Archbold*. Eighth edition. By *John Flather*.

The Rise and Progress of the Laws of England and Wales; with an account of the Origin, History, and Customs,—Warlike, Domestic, and Legal,—of the several nations,—Britons, Saxons, Danes, and Normans,—who now compose the British Nation. By *Owen Flintoff*.

An Introduction to Conveyancing, and the History, Nature, Incidents, and Titles of Legal Estates. By *Owen Flintoff*.

The Law of Real Property, with the Statutes relating thereto, down to the present time. Vol. 2. By *Owen Flintoff*.

An Introductory Lecture on the Study of English Law, delivered in University College, London, on Monday, December 17, 1838. By *P. Stafford Carey*, M. A., Professor of English Law.

UNITED STATES.

Theory of Legislation : by *Jeremy Bentham*. Translated from the French of Etienne Dumont, by R. Hildreth, author of "Banks, Banking, and Paper Currencies," "Despotism in America," "Archy Moore," &c. 2 Volumes. 12mo. Boston : Weeks, Jordan & Co. 1840.

A Digest of the Cases decided in the Superior Courts of Law of the State of South Carolina; from the earliest period to the present time. With tables of the names of the Cases, and of Titles and References. By *William Rice*, Attorney at Law. In two volumes. Charleston : Burges and James, 1838 & 1839.

A Digested Index of the Statute Law of South Carolina, from the earliest period to the year 1836, inclusive. By *William Rice*. Charleston : J. S. Burges, 1838.

Reports of Cases in Chancery, argued and determined in the Court of Appeals and Court of Errors of South Carolina, from December, 1838, to May, 1839, both inclusive. By *William Rice*, State Reporter. Charleston : Burges and James, 1839.

Machiavel's Political Discourses upon the first Decade of Livy. Interspersed with various reflections. Louisville : Prentice and Weissenger, 1840.

[An interesting tract, originally published in the Southern Literary Messenger, by Robert Wickliffe, jr., of Louisville, Ky.]

A memoir of William Rawle, L.L.D., President of the Historical Society, &c. By *T. J. Wharton*, Esq. Read at a meeting of the Council, held on the 22d day of February, 1837, and printed by order of the Society. With a letter from Peter Stephen Duponceau, Esq., to the author, containing his recollections of Mr. Rawle's life and character. Philadelphia, 1840.

Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Correction of Errors of the State of New York. By *John L. Wendell*, Counsellor at Law. Volumes XX and XXI. Albany: Wm. & A. Gould & Co., 1840.

A Treatise on the Common Law in relation to Water Courses. By *Joseph K. Angell*. Second Edition, much enlarged. Boston: Little & Brown, 1840.

The Practice of Courts Martial. By *Alexander Macomb*, major-general of the army of the United States. New York: Samuel Colman, 1840.

Condensed Reports of Cases decided in the High Court of Chancery in Ireland. . Edited by *E. D. Ingraham*, Esq., Counsellor at Law. Vol. XII. Containing the Cases decided by sir Anthony Hart, Lord Chancellor; and sir William M'Mahon, Master of the Rolls. Philadelphia: Grigg & Eliot, 1840.

A Compendious View of the Civil Law, and of the Law of the Admiralty. By *Arthur Browne*. First American from the second London edition, with great additions. In two volumes. New York: Halsted & Voorhies, 1840.

Reports of Select Cases decided in the Court of Appeals of Kentucky, during the Spring term of the year 1839. By *James G. Dana*. Volume VIII. Frankfort, Ky.: Printed for the Reporter, 1840.

The Papers of James Madison, purchased by order of Congress; being his Correspondence and Reports of Debates during the Congress of the Confederation and his Reports of Debates in the Federal Convention; now published from the original manuscripts, deposited in the department of state, by direction of the Joint Library Committee of Congress, under the superintendence of *Henry D. Gilpin*. In three volumes. Washington: Langtree & O'Sullivan, 1840.

IN PRESS.

Commentaries on Equity Pleadings. By *Joseph Story*. 2d Edition, with additions.

ERRATUM.

Page 480, line 14, for "*latent*" read "*patent*."

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American Law Periodicals, 135-137.

American Reports, Digests of, 128-134.

Byfield, Nathaniel, Biographical Sketch of, 64-69.

Chase, Judge, Anecdote of, 492.

Circumstantial Evidence, Case of, 489.

Contracts, Law of, 1-23 ; 257-290 ; unlawful, 1 ; construction of, 257.

Critical Notices :—Attorney General's Report, 477 ; Carey's Lecture, 476 ; Combe's Moral Philosophy, 476 ; Commercial Code of Holland, 480 ; Criminal Code (project) for the Grand Duchy of Hesse, 477 ; Criminal Code (project) for Berne, 482 ; Destrais on Revendication, 481 ; Engelmann's Bibliotheca Juridica, 479 ; Judicial Chronicle, 245 ; Jurist Reports, 247 ; Lieber's Political Ethics, 467 ; Lubé's Equity Pleading, 246 ; Metcalf & Perkins's Digest, 246 ; Peters's Digest, 243 ; Philipps & Amos's Law of Evidence, 247 ; Revised Statutes of Arkansas, 475 ; Rice's Digests, 474 ; Rice's Equity Reports, 478 ; Rocco's authority of the laws of the kingdom of the Two Sicilies in foreign countries, 482.

Drunkenness, Effect of, on Criminal Responsibility, 290-332.

Erskine, Anecdotes of, 492.

Fualdes, Assassins of, Trial of, 95-128.

Gillespie and others v. Forsyth and others, Case of, 221-235.

Hull of a New Brig, Case of, 453-461.

International Law, Private, 73-94.

Lawyers, Fitness of for Legislation, 491.

Legislation :—of Alabama, 465 ; Georgia, 464 ; Illinois, 462 ; Massachusetts, 463 ; Michigan, 237 ; Rhode Island, 462 ; South Carolina, 465 ; Virginia, 236.

Light, Enjoyment and Use of, Legal rules regulating, 46-64.

Marks or Signs of Merchants and Traders, Piracy of, 138-146.

Metcalf, Theron, Testimony of Respect to, 484.

Mistakes of Law, 146-166 ; 371-412.

Mittermaier's German Criminal Procedure, 254.

Narrow Escape, 492.

Seamen, Obedience of to the Master of a Vessel, 70-73.

Slave-holding States, and Owners of Slaves, Rights of, 23-46, 338-366.

Stuart, Andrew, Obituary Notice of, 248-254.

Winslow, John, Biographical Sketch of, 366-370.

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